Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

LIVINGSTON DOWNS RACING ASSOCIATION, INC.
Petitioner,

v.

LOUISIANA STATE RACING COMMISSION
Respondent.

On Petition For Writ Of Certiorari To the Supreme Court Of The State Of Louisiana

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PETITION FOR WRIT OF CERTIORARI

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27-1PP

QUESTIONS PRESENTED

1. May a state agency revoke a license to operate a business without notice, without a hearing, without giving the license holder an opportunity to defend and without complying with the procedural due process rights granted the license holder by state law?
2. Is due process violated when the administrative agency does not conduct a hearing and the state court does not conduct a trial de novo as required by state law?
3. Is due process violated in the course of judicial review of an agency's actions when the judicial decisions are based upon an incomplete record which does not contain reasoned findings of fact, conclusions of law or substantial evidence to support the decisions made?
4. Is the right to free access to the courts violated when the court refuses to allow a party to participate in the proceeding and present evidence?
5. Is it a denial of equal protection when a state statute which undertakes to regulate a lawful business by conferring upon a commission or board the authority, within the commission or board's judgment or discretion, to grant or withhold a license or permit to engage in a business where the statute does not prescribe a rule or standard to which all persons similarly situated may conform?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Supreme Court of the State of Louisiana:

1. Livingston Downs Racing Association, Inc. (Appellant)
2. Louisiana State Racing Commission (Appellee)

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The opinion of the Louisiana Supreme Court is not reported. It is included in the Appendices as Appendix A. The Louisiana Fourth Circuit Court of Appeal's denial of petitioner's application for rehearing is included in the Appendices as Appendix B. The decision of the Louisiana Fourth Circuit Court of Appeal is reported as Jefferson Downs Racing Association v. State Racing Association, 99-1001 (La. App. 4th Cir. 2/16/00). It is included in the Appendices as Appendix D. The decision of the Civil District Court for the Parish of Orleans is not reported. It is included in the Appendices as Appendix H.

JURISDICTION

The judgment of the Louisiana Supreme Court denying the petitioner's application for supervisory writs was entered on May 26, 2000. This Petition for Writ of Certiorari is being filed within 90 days of that date. The jurisdiction is being invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT FOURTEEN

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE WRIT

In the interest of justice, this Honorable Court should grant this petition for writ of certiorari because the Louisiana Supreme Court has decided important questions of federal law in a way that conflicts with relevant decisions of this Honorable Court.

STATEMENT OF THE CASE

A. Preliminary Statement

Why should this Honorable Court grant this writ to decide the fate of a license for a race track? This writ is necessary to redress a state agency's blatant trampling of a private citizen's rights of due process and equal protection under the U. S. Constitution. The trampling occurred as a result of collusion between the regulatory agency and powerful private gambling interests. The fingerprints of corruption are all over this case.

Wagering on horse races is one of the oldest and most widely accepted legal forms of wagering. The recent building of new racetracks, off-track, intertrack and telephone wagering is legal in most states. The industry has grown into a multi-billion dollar segment of interstate commerce. The protection of the constitutional rights of those private citizens participating in this industry is of growing national importance. The actions of the Louisiana State Racing Commission should not be allowed to set the standard of conduct on the issue of due process and equal protection under the law.

This case presents substantive and procedural due process issues as well as denial of equal protection under state and federal law.

B. Statement of Facts

On December 10, 1992, the Commission granted to LDRA a racing association permit/license pursuant to LSA-R.S. 4:159 and R.S. 4:181. The awarding of the December 10, 1992 license/permit to LDRA was only step one in a process which required LDRA to apply for further licensing by the Commission before it could operate a race track and on site other track wagering/simulcasting. This first step enabled LDRA to apply for a referendum in Livingston Parish for approval by the voters of whether or not the business of horse racing would be conducted in

Livingston Parish with pari-mutuel wagering thereon. The proposition was approved by the voters of Livingston Parish by a wide margin.

On December 11, 1992 the four existing racing associations licensed by the Commission along with a nonlicensed racing association filed a Petition for Judicial Review against the Commission to annul and/or set aside the LDRA permit/license. The petition for judicial review was filed in the Civil District Court for the Parish of Orleans, State of Louisiana, Suit #92-20961, Division "G," allotted to the Honorable Robin Giarrusso. The four licensed racing associations were Fair Grounds Corporation, Louisiana Downs, Inc., New Evangeline Downs and Delta Downs, Inc. The nonlicensed racing association was Jefferson Downs Corporation, which voluntarily forfeited its racing license in November 1992. This was the first of three lawsuits attempting to stop and/or annul the Livingston Parish referendum.

In Suit No. 92-20961, Judge Giarrusso consistently ruled against LDRA and in favor of the plaintiffs. Judge Giarrusso ordered that "the decision of the Louisiana State Racing Commission of December 10, 1992 granting to Livingston Downs Racing Association, Inc. a license to conduct race meetings in the Parish of Livingston is reversed . . . the license is hereby vacated and recalled." This decision was appealed to the Louisiana Fourth Circuit Court of Appeal, which reversed Judge Giarrusso's decision and upheld the validity of LDRA's license. This became a final judgment in these proceedings as the plaintiffs filed no further appeals within the time delays afforded by law.

The Louisiana statutory scheme to regulate the racing industry centers around LSA-R.S. 4:147(1)(a), which prohibits racing with the same or overlapping racing dates within a 100-mile radius of any race tracks.

La.R.S. 4:211, et seq. governs the authorization, establishment, ownership and management of off-track wagering facilities. Pursuant to La.R.S. 4:211, et seq., only

those race tracks conducting race meetings during the 1986-87 racing season and licensed prior to June 30, 1987 may be licensed to own and/or operate off-track wagering facilities in Louisiana. Similar to the statutory 100-mile radius rule for race tracks, off-track wagering facilities are statutorily controlled by a 55-mile radius, measured from the parish seat in the parish where the off-track wagering facility is located. La.R.S. 4:215(b) provides a formula for general ownership of off-track wagering facilities when more than one live racing facility is located less than 55 miles from the parish seat in the parish which they are located. La.R.S. 4:215(c) provides for ownership of off-track wagering facilities in parishes whose parish seat is 55 miles or more from the live racing facility. However, the right to operate as an on site off-track wagering/simulcasting facility is governed by LSA-R.S. 4:149.2. This enables a racing facility to simulcast live races from other areas at its main racing facility and accept pari-mutuel wagering thereon.

The LDRA site in Livingston Parish which was approved by the Commission is located within the 100-mile radius for live racing and the 55-mile radius for off-track wagering parlors formerly shared by Jefferson Downs and the Fair Grounds. LDRA would replace the live racing days lost by the closure of Jefferson Downs and the forfeiture of its racing license. Jefferson Downs, which was wholly owned by Bryan and Marie Krantz, was closed after the Krantzs purchased the controlling interest in the Fair Grounds. When the Krantzs purchased the Fair Grounds, Jefferson Downs was the only competition in the statutorily defined market area.

It has been established by racing industry experts that a race track cannot survive or be economically feasible without the assistance of other track wagering/simulcasting. All other race tracks operating in Louisiana were granted the right pursuant to R.S. 4:149.2 to operate their main facilities as on-site off-track wagering parlors. However, the

Commission not only denied this right to LDRA but refused to address the matter in open meeting.

Within 77 days after LDRA was granted its initial permit/license, the Krantz family gambling interests (which includes Bryan Krantz, Marie Krantz, Fair Grounds Corporation, Jefferson Downs Corporation, Finish Line Management, Inc. and *incredibly*, the Committee to Control Gambling, Inc.) initiated three separate lawsuits filed in two different parishes to stop and/or impede the referendum required by law before LDRA could construct its project. All three suits were eventually resolved in favor of LDRA and dismissed.

In order to preserve its yearly racing season, new racing associations must apply for and obtain specific race dates even during its construction and development phases in order to protect those dates. LDRA filed its application to the Commission for a 10-year racing license to conduct specific racing dates in September 1993 through April 1994 and requested to be placed on the January 21, 1993 Commission meeting agenda. The Commission made no reply to these requests by LDRA and this item was not placed on the agenda of the Commission meeting nor was it heard at the January 21, 1993 meeting. The same request was filed on January 29, 1993 and again on March 11, 1993. LDRA received no response from the Commission.

On March 22, 1993 LDRA filed its third formal application for a 10-year racing license to conduct specific race dates in September 1993 through April 1994 to be placed on the April 15, 1993 Commission meeting agenda. It was placed on the agenda. When the issue of LDRA's license was taken up, Ms. Tucker, Assistant Attorney General assigned to the Commission, read into the record that if LDRA was granted its license and racing dates LDRA could have a legal challenge to claim a share of the Jefferson Downs off-track betting parlors. The Commission then deferred action on LDRA's application without reason and LDRA was told to reapply in May.

The Commission finally acted on LDRA's application and awarded LDRA a 10-year license to conduct a race meet and specific race dates on May 27, 1993, only after LDRA filed a writ of mandamus, Suit #93-8567, Civil District Court for the Parish of Orleans. The issue of whether LDRA was entitled to operate off-track betting parlors (those located off-site as opposed to other track wagering authorized pursuant to LSA-R.S. 4:149.2 at a racing association's main facility) was decided in a separate declaratory judgment proceeding entitled Livingston Downs Racing Association, Inc. v. State Through Edwards, Suit No. 399,563, 19th Judicial District Court, East Baton Rouge Parish.

On April 29, 1994, the Commission suspended and/or revoked LDRA's license, and/or terminated the racing privileges granted to LDRA. This was done without affording LDRA any notice whatsoever of the Commission's intent to consider or take such action. This included a failure to provide the required "Bertucci" hearing established by Louisiana jurisprudence and in noncompliance with the Administrative Procedure Act, more specifically LSA-R.S. 49:955 and 49:961(C). Louisiana State Board of Medical Examiners v. Bertucci, 593 So.2d 798, (La.App. 4th Cir. 1992). LDRA objected on the record at the Commission meeting of the failure to afford it notice of or a "Bertucci" hearing Louisiana law requires.

LDRA immediately thereafter filed a Motion for Trial de Novo and Suspensive Appeal pursuant to LSA-R.S. 4:158(A). The case was initially filed in the Parish of LDRA's domicile, Livingston Parish pursuant to LSA-R.S. 4:158(A) and docketed as Suit No. 71,137. The Commission subsequently excepted to the venue. The District Court and the Louisiana First Circuit Court of Appeal denied the exception of venue. The Louisiana Supreme Court, however, transferred the case to the Orleans Parish Civil District Court. LDRA's petition for rehearing was denied by the Louisiana Supreme Court. This case was transfer to Orleans Parish and docketed in the Civil District Court for the Parish of Orleans

as Suit No. 95-15331, Division J. Subsequently, purportedly pursuant to a Local Rule 7 of the Orleans Parish Civil District Court, the case was transferred to the Honorable Robin Giarrusso on ex parte motion of Salvador Anzelmo, counsel for the racetracks in Suit No. 92-20961, and consolidated with Suit No. 92-20961, which had been concluded for over a year.

On motion of the Commission, Judge Giarrusso, without benefit of the administrative record, dismissed the suspensive appeal. (***See Appendix I***). LDRA filed a writ of certiorari with the Louisiana Fourth Circuit Court of Appeal which reversed and set aside Judge Giarrusso's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 4:158. (***See Appendix J***). The Louisiana Supreme Court denied the Commission's application for supervisory writs. (***See Appendix K***).

On August 30, 1996 LDRA named current and former Commission members, Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas, together with Melinda Tucker, former attorney for the Commission, as defendants in a suit filed in U.S. District Court, Middle District of Louisiana captioned *Livingston Downs Racing Association, Inc. v. Jefferson Downs Corporation, et al.*, Civil Action No. 96-3430-C-M1. Among the allegations contained in the petition were conspiracy to violate antitrust, restraint of trade and §1983 Civil Rights violations for illegal actions under color of state law. (See ***Appendix O***).

Shortly thereafter, the Commission defendants approached LDRA to discuss a resolution of the issues. LDRA's desire was to move forward with its efforts to build its race track project. The Commission and LDRA negotiated the consent judgment, and in return LDRA dismissed the Commission defendants from the federal lawsuit.

On November 15, 1996 the parties entered into a consent judgment (hereinafter referred to as the "consent judgment") approved by the trial court. (See *Appendix N.*)

Had the parties not entered into the consent judgment, the issue of the license revocation would have proceeded to trial on the merits in Judge Giarrusso's court. The record and law clearly supports LDRA's position. Furthermore, the Commission would have faced an expensive trial in federal court, with significant exposure to personal monetary damages. LDRA negotiated the consent judgment in good faith. It is now apparent that the Commission members, on the other hand, secured a release to their benefit and simply waited for the appropriate time and opportunity to again work in conjunction with other federal defendants to keep LDRA from building its race track project. The Commission's actions are purely retaliatory to punish LDRA for daring to stand up for its constitutionally protected rights of due process and equal protection.

Of the three lawsuits that were originally initiated after LDRA's permit/license was issued, the final suit, entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish was dismissed with prejudice on August 18, 1998. The Odom litigation, which was admittedly initiated and financed by the Krantz family gambling interests, succeeded in constituting the major impediment to LDRA obtaining a financing commitment. This litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of live horse racing in Livingston Parish.

As soon as the dismissal was ordered in the Odom litigation, LDRA sent a written request to the Commission for an extension of the October 31, 1998 deadline contained in the consent judgment. On September 17, 1998 the Commission advised counsel for LDRA that the Commission was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further stated that LDRA had

not been placed on the agenda of the Commission's September 26, 1998 meeting; however, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline.

The Commission purportedly held the meeting on Saturday, September 26, 1998. The Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. This is in violation of the Administrative Procedure Act.

The Commission has failed to produce to the Court any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on LDRA's request for an extension. (See ***Appendix P***) LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered an application for specific race dates with an attached financing commitment to the Commission office in New Orleans, Louisiana and the required $5,000.00 deposit in the form of a cashier's check. LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said application for specific dates with the attached financing commitment as required by LSA-R.S. 4:151, et seq. To date, the Commission has not returned the $5,000.00 deposit submitted by LDRA which must be a part of the application. More specifically, LSA-R.S. 4:158 provides that "the Commission shall convene to consider the

refusal or granting of the permits or licenses applied for." The manner in which the Commission can convene is dictated by LSA-R.S. 42:4.2, et seq. (the Open Meetings Law) and 49:961, et seq. (the Administrative Procedure Act). The Commission took absolutely no action whatsoever. This is in direct violation of the Administrative Procedure Act, is in bad faith, violates the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974 and the Fourteenth Amendment to the United States Constitution.

On November 10, 1998 the Commission filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to one who was not lead counsel. Said notice was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter timely. However, the Commission has not even acknowledged receipt of said commitment (other than date and time stamp by its Executive Director on October 30, 1998) or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." The Commission made no to RFG's communication. The Commission simply, in bad faith, breached its agreement with LDRA.

On November 18, 1998, LDRA filed a motion to continue the hearing on the Commission's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was informed that said clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for

LDRA again contacted Judge Giarusso's office and was advised by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and advise that LDRA would be allowed oral argument on the motion.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on December 4, 1998, a contradictory hearing did not take place. Despite the fact numerous exceptions were filed by LDRA, along with a petition for writ of mandamus and a motion to enforce section 16 of the consent judgment, the hearing lasted less than ten minutes. After a brief opening statement by counsel for the Commission, Judge Giarrusso recognized Mr. Victor Sachse, III, counsel for LDRA. Mr. Sachse noted that Mr. Paul Burgess, Executive Director of the Commission, and Ms. Kim Chatelain, counsel for the Commission, were present. Mr. Sachse attempted to these two parties as witnesses to testify that there had been no official action taken by the Commission which authorized the filing of the subject motion to dismiss. Judge Giarrusso refused stating that she was granting the motion to dismiss and refused to allow the introduction, or even the proffer, of any evidence. Judge Giarrusso advised Ms. Chatelain to draw up the order and that she would sign the order the same day. Gavel down, hearing over, order signed within hours. The court did not record and, therefore, could not provide a transcript of this hearing.

The trial court's refusal to permit LDRA to participate in a proceeding in open court and to present its case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of LDRA's right to free access to the courts under La. Const. Art. 1, Section 22. LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not

necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then the party's rights under Art. 1 Section 19 are violated.

LDRA filed three separate motions requesting that the Court of Appeal direct the Clerk of Court for the Parish of Orleans to complete the record on appeal, all of which are a part of the appellate record. The Court of Appeal twice ordered the appellate record supplemented. However, at noon on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion requesting that the Court of Appeal direct the Civil District Clerk to complete the appellate record and also filed a motion to withhold submission of the case until the record was complete. At the oral argument before the Court of Appeal, the panel stated that it would address the matter of the incomplete record at a later date. Undersigned counsel never received any notification that the motions were acted upon. The pleadings missing from the record which are absolutely essential to the just adjudication of this matter and specifically germane to the motion to dismiss filed by the Commission which was the subject of the petitioner's appeal to the Louisiana Fourth Circuit Court of Appeal are enumerated in the Fourth Circuit's Second Order to Complete the Record on Appeal. (See ***Appendix F***). The Civil District Clerk failed to even supplement the record with these seventeen documents which are required for the trial court, the appeal court, the Louisiana Supreme Court and this Honorable Court to render a decision.

Moreover, the administrative record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the

Commission. Not only does it not contain LDRA's requests to the Commission to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so, but also does not contain nine Commission meeting transcripts which were proffered into the record by the Commission's own attorney at the April 29th meeting. (See ***Appendix M, pages 83m***). LDRA even offered, in both its second and third motions to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate court, if necessary. (***See Appendix M***).

LDRA has made every attempt to have a complete record before this Court. (***See Appendices E, F and G***). Without a complete record, LDRA's due process rights are being violated.

C. Procedural History

On April 24, 1994, the Commission revoked LDRA's permit/license. LDRA filed a petition for suspensive appeal and for a trial de novo on April 29, 1994 within minutes of the Commission's revocation of its license. The case was initially filed in the Parish of LDRA's domicile, Livingston Parish pursuant to LSA-R.S. 4:158(A) and docketed as Suit No. 71,137. The Commission subsequently excepted to the venue. The Livingston Parish District Court denied the Commission exception of venue, the Louisiana First Circuit Court of Appeal affirmed, Docket No. 94-CW-2229. The Louisiana Supreme Court, however, transferred the case to the Orleans Parish Civil District Court. LDRA filed a petition for rehearing with the Louisiana Supreme Court which was denied. The case was docketed in the Civil District Court for the Parish of Orleans as Suit No. 95-15331, Division J. Subsequently, purportedly pursuant to a Local Rule 7 of the Orleans Parish Civil District Court, the case was transferred to the Honorable Robin Giarrusso on ex parte motion of Salvador Anzelmo, counsel for the racetracks in Suit No. 92-20961, and consolidated with Suit No. 92-20961, which had been concluded for over a year. All subsequent

litigation filed by LDRA in the Orleans Civil District Court has subsequently been transferred and consolidated with Suit No. 92-20961.

The Commission filed a motion to dismiss which was granted by Judge Giarrusso on April 26, 1996, but subsequently overturned by the Louisiana Fourth Circuit Court of Appeal. The parties entered into a consent judgment in this matter on November 15, 1996. On motion of the Commission, the Orleans Civil District Court dismissed this action on December 4, 1998. LDRA filed an appeal with the Fourth Circuit Court of Appeal which affirmed the trial court judgment without a complete record and denied petitioner's application for rehearing, Docket No. 99-CA-1001 c/w 99-CA-1002. The Louisiana Supreme Court denied petitioner's application for supervisory writs, Docket No. 00-C-1067.

ARGUMENT

A. Denial of Due Process

The issue is not whether the procedural safeguards put into place by the State of Louisiana to prevent governmental deprivation of property without due process of law are insufficient. Rather, the issue is whether LDRA was deprived of its license to operate a race track as a direct result of the Commission's refusal to abide by those procedural safeguards and by the Louisiana state court's failure to comply with the requirements for judicial review that comports with due process.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." This clause imposes procedural constraints on governmental entities to prevent citizens from being mistakenly or unjustifiably deprived of their interests which are classified as property within the meaning of the Due Process Clause. Although the underlying substantive interest, or "property "

is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. Memphis Light, Gas & Water Div. Vs. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed2d 18 (1976); Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972).

The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265 (1982); Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); Memphis Light, Gas & Water Div. v. Craft, supra; Goss v. Lopez, 419 U.S. 565, 573-574, 95 S.Ct. 729, 735-736, 42 L.Ed.2d 725 (1975); Board of Regents v. Roth, supra.

Once the determination is made that the individual entitlement is one that cannot be removed except "for cause" then the issue becomes what one of process due. As Justice Jackson observed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950): "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." In short, the State may not permanently deprive a person of a property interest without first giving that person a meaningful opportunity to oppose the deprivation and to have the decision made fairly and impartially. Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971).

As this Court has stated in Mathews v. Eldridge, supra, "this Court consistently has held that some form of hearing is required before an individual is finally deprived of

a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e. g. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also Dent v. West Virginia, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)."

Although some form of hearing is required before a person can be finally deprived of a protected property interest, the constitutional sufficiency of the procedures used depends on a balancing of the competing governmental and private interests involved in the taking. These competing interests include: (1) the importance of the private interest that will be affected by the official action; (2) the length or finality of the deprivation; (3) the risk of an erroneous deprivation of such interest through the procedures actually used; (4) the likelihood of governmental error; and (5) the magnitude of the governmental interests involved, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Logan v. Zimmerman Brush Co., supra; Memphis Light, Gas & Water Div. v. Craft, supra; Matthews v. Eldridge, supra; Goss v. Lopez, supra; Wolff v. McDonnell, supra.

In the present case we are faced with a three part inquiry. First, was LDRA deprived of a protected interest?

Second, what process was LDRA entitled to? Third, did LDRA receive that process?

1. Property Interest

The property involved in this controversy is LDRA's license to operate a race track in Louisiana. The State of Louisiana, through the Commission, extensively regulates horse racing in Louisiana. The statutes governing horse racing are located in Chapter 4 of Title 4 of the Louisiana Revised Statutes. The racetracks are privately owned, but must be licensed by the Commission. the racing meets and many aspects of track management are governed by detailed state statutes and by regulations issued by the Louisiana State Racing Commission. Roberts v. Louisiana Downs, Inc., (CA 5 Cir. La 1984), 742 F.2d 221.

The licensing of persons or legal entities to conduct race meetings is governed by the provisions of La.R.S. 4:157 through 160. R.S. 4:157 provides that any person or legal entity may conduct one or more race meetings at a track each year, subject to the provision of Part I of Chapter 4 of Title 4 of the Revised Statutes, (La.R.S. 4:141-197). R.S. 4:158 provides that any person possessing the qualifications prescribed in Part I may apply to the Commission for a license to conduct race meetings. Subsection B of R.S. 4:158 allows the Commission to issue any licensee a ten year permit to operate a race track. R.S. 4:159 establishes the criteria for licensing racing associations in Louisiana and R.S. 4:160 establishes the exclusive grounds for denial or termination of a racing association's racing privileges.

On December 10, 1992, LDRA applied for and received a ten year permit or license to conduct horse racing in Louisiana. Once granted, this license could not be suspended or revoked by the Commission "at will." Suspension or revocation could only be for just cause, R.S. 4:160, and only after due proceedings held in conformity with applicable law. LSA-R.S. 4:158(A). Thus Louisiana acknowledges that a license to operate a race track is a

property interest protected by the Due Process Clause. Further, if a horse trainer's license has been found to be a protected property interest, Barry v. Barchi, supra, and a horse owner's license to race his horse has also been found to be a protected property interest, Gamble V. Webb, (C.A. 5 La. 1986), 806 F.2d 1258, it cannot be seriously argued that a license to operate a race track is not a protected property interest.

2. The Nature of the Due Process Required

The reasons that the Commission may rely on to deny or terminate racing privileges are strictly limited to the grounds set out in R. S. 4:160, which provides:

> "The commission may refuse, suspend, or withdraw licenses, permits and privileges granted by it or terminate racing privileges, for just cause. Those things constituting just cause are: (1) Any actions by a licensee or permittee contrary to the provisions of this Part and the Rules of Racing. (2) Corrupt practice. (3) Violations of the Rules of Racing. (4) Intentional falsification and/or intentional misstatement of a material fact in an application for racing privileges. (5) Material false statement to a racing official (other than a Commissioner) and/or the commission. (6) Continued failure or inability to meet its financial obligations connected with fulfillment of the purposes for which its license was issued."

The Commission's determination as to whether there is just cause to deny or terminate racing privileges must be made after "due proceedings" held in conformity with Part I of Chapter 4 of Title 4 of the Louisiana Revised Statutes. See, R.S. 4:158(A). These "due proceedings' must be held in accordance with Louisiana's Administrative Procedure Act, (R.S. 49:950-997). R.S. 4:154(A) provides in pertinent part that:

"Except as otherwise provided by this Section, the commission's hearings, practice and procedure, and rule making procedure are as provided in the Administrative Procedure Act; . . ."

Louisiana's Administrative Procedure Act, (APA), provides the procedures that must be followed whenever the grant denial or renewal of a license is required by law to be preceded by notice and opportunity for hearing. R.S. 49:951(1) defines "adjudication as the "agency process for the formulation of a decision or order. Subsection (2) of that statute defines "decision" or "order" as "[t]he whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing, and including non-revenue licensing, when the grant, denial, or renewal of a license is required by constitution or statute to be preceded by notice and opportunity for hearing."

R.S. 49:961 provides in pertinent part:

"A. When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Chapter concerning adjudication shall apply.

* * *

C. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license.. ."

In an adjudication all parties are afforded the following rights under R.S. 49:955:

"A. In an adjudication, all parties who do not waive their rights shall be afforded an opportunity for hearing after reasonable notice.

B. The notice shall include: (1) A statement of the time, place, and nature of the hearing; (2) A statement of the legal authority and jurisdiction under which the hearing is to be held; (3) A reference to the particular sections of the statutes and rules involved; (4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

D. Unless precluded by law, informal disposition may be made of any case of adjudication by stipulation, agreed settlement, consent order, or default.

E. The record in a case of adjudication shall include: (1) All pleadings, motions, intermediate rulings; (2) Evidence received or considered or a resume thereof if not transcribed; (3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose; (4) Offers of proof, objections, and rulings thereon; (5) Proposed findings and exceptions; (6) Any decision, opinion, or report by the officer presiding at the hearing.

F. The agency shall make a full transcript of all proceedings before it when the statute governing it

> requires it, and, in the absence of such requirement, shall, at the request of any party or person, have prepared and furnish him with a copy of the transcript or any part thereof upon payment of the cost thereof unless the governing statute or constitution provides that it shall be furnished without cost.
>
> G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed."

Although the Administrative Procedure Act, under R.S. 49:964, provides a procedure for judicial review of agency decisions or orders that procedure is superseded by the provisions of R.S. 4:158(A) which provides that an appeal for a decision of the Commission that suspends or revokes a license or terminates racing privileges of a racing association shall be tried de novo by the court that has jurisdiction over the racing association's track.

This, in summary, is the procedure that the State of Louisiana required the Commission and the courts, on judicial review, to follow before LDRA's license could be revoked and its racing privileges terminated. Was LDRA granted these due process rights before its license was revoked and its racing privileges terminated?

3. Was Due Process Afforded?

It is not enough that a state provides an adequate due process procedure for state agencies to follow. Due process requires such agencies to substantially comply with those procedures. In reviewing state action "we look to substance, not to bare form, to determine whether constitutional minimums have been honored." Willner v. Committee on Character, 373 U.S. 96, 106--107, 83 S.Ct. 1175, 1182, 10 L.Ed.2d 224 (1963) (concurring opinion by Justice Goldberg).

LDRA was entitled to the protection of these due process procedures at the original hearing of April 29, 1994 which was the original attempt by the Commission to revoke

LDRA's license and to terminate its racing privileges. Even though the submission of the supplemental application for a license on October 31, 1998 was in conjunction with a settlement agreement the Commission was still required to follow the due process procedures set out by state law in determining whether to approve or reject the application. Lastly LDRA was entitled to a de novo hearing from the Racing Commission's action of April 29, 1994 and the Commission's failure to consider LDRA's application of October 31, 1998.

a. April 29, 1994 revocation of LDRA's License

R.S. 49:961 made it unlawful for the Commission to revoke LDRA's license and or to terminate LDRA's racing privileges on April 29, 1994 without first giving LDRA notice by mail of the facts or conduct which warranted the intended action and without giving LDRA an opportunity to show compliance with all lawful requirements for the retention of the license or racing privileges. In addition to the requirement in any adjudicatory proceeding of notice and opportunity to be heard, in proceeding which may lead to suspension, revocation, annulment or withdrawal of an existing license, agency must give licensee an opportunity prior to institution of formal proceedings, to show that actions complained of did not violate the law or agency rules. Bertucci, supra. The Commission revoked LDRA's license on April 29, 1994 without complying with this requirement.

Further, the Commission gave LDRA no notice that it intended to or was contemplating revoking LDRA's license. Although LDRA suspected that the Commission would revoke its license at the April 29th hearing, LDRA had no formal notice of that fact.

b. October 31, 1998 application

The settlement agreement between LDRA and the Commission suspended the litigation regarding the April 29, 1994 revocation of LDRA's license or racing privileges.

LDRA agreed to submit a new or supplemental application, which would include a binding and enforceable commitment for at least $10 million. That application had to be filed by October 31, 1998. The Commission agreed to investigate the financial commitment(s) and to promptly act upon LDRA's application. Only if LDRA failed to file an application with a binding enforceable financial commitment for at least $10 million could the suit be dismissed.

LDRA filed the application with the financial commitment on October 30, 1998. The Commission was then required to act on the application by either approving it or denying it. The application could only be denied for just cause, and even then only if the application failed to meet one of the six grounds set out for denial under R. S. 4:160. In order to deny the application for just cause the Commission was required by R.S. 4:158(A) to hold a hearing in accordance with the APA. The Commission failed to do this.

In fact the Commission never acted on the application. Instead the chairman of the Commission, on his own and without a vote of the Commission, directed the Commission's legal counsel to file a motion to dismiss the lawsuit on the pretexts that the financial commitment was not a binding commitment for $10 million and that the application was not made in the name of LDRA. The Commission gave LDRA no opportunity to prove that the commitment was a binding commitment for $10 million or that the application was made on behalf of LDRA. The Commission failed to give LDRA even the minimum due process requirements of "notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra.

Utilizing this court's balancing test, it is clear that LDRA has been denied due process by the Commission. LDRA's stake in the outcome of this matter is substantial. Substantial expense is involved in the building and operating of a racetrack. Without a license to conduct racing a

racetrack is useless and the investment in the enterprise is lost. The loss of revenues is also substantial. Between the loss of investment capital and loss of revenues LDRA would lose millions of dollars a year. Further this loss would be permanent.

There is a great risk of an erroneous deprivation of this investment and revenues through the procedures used by the Commission. In fact that risk has occurred. The Commission has thrown out the window every procedural safeguard required by the Due Process Clause, by Louisiana's APA and by Louisiana's statutes governing the issuance of racing licenses. The result is arbitrary and capricious actions by the Commission deciding which procedures it will follow and which procedures it won't follow. The likelihood of error is substantial.

On the other side of the equation are the interest of the State of Louisiana's and the fiscal and administrative burdens that adherence to due process requirements would impose on the Commission. While the State of Louisiana has a substantial interest in insuring the integrity of racetracks the State has already balanced its interest against the interests of racing associations like LDRA. The State has set out a procedure for the Commission to follow in approving, denying, suspending or revoking the licenses of racing associations. There is not compelling state interest requiring the Commission to evade the procedures set out by the State of Louisiana. The fiscal and administrative burdens of adhering to the state procedures are minimal. Those burdens certainly do not outweigh the degree of harm resulting from a wrongful denial or revocation of LDRA's license or racing privileges.

c. <u>Denial of due process on judicial review.</u>

After the Commission revoked LDRA's license on April 29, 1994 LDRA filed a petition for judicial review. The complete record of the Commission's meeting of April 29, 1994 was never filed with the district court. The district

court never held a trial de novo regarding the Commission's revocation of LDRA's license on April 29, 1994.

After LDRA filed its application on October 31, 1998, in accordance with the consent judgment, the Commission filed a motion to dismiss with the Civil District Court for the Parish of Orleans, the same court that had denied LDRA a suspensive appeal from the April 29, 1994 order of the Commission. The Civil District Court, without hearing any testimony, without taking any evidence, and without giving LDRA the opportunity to be heard dismissed the suit with prejudice after a five minute session in open court.

When the dismissal was appealed to the Louisiana Fourth Circuit Court of Appeal the complete record was not sent to the Court of Appeal. That court, therefore, had no facts or evidence upon which to decide the appeal. Effective judicial review is possible only if the decisions of the administrative agencies and the lower courts are based on substantial evidence and reasoned findings. Baltimore & Ohio Railway Co. V. Aberdeen & Rockfish Railway Co., 393 U.S. 87, 91-92, 89 S. Ct. 280, 284, 21 L.Ed.2d 219, reh. den. 393 U.S. 1124, 89 S. Ct. 987, 22 L.Ed.2d 131.

While the erroneous decision of state courts do not deprive an unsuccessful party of his property without due process of law the party must have been fully heard in the regular course of the judicial proceedings. Bonner v. Gormn, 213 U. S. 86, 29 S. Ct. 483, 53 L.Ed 709 (1909); Central Land Co. v Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L.Ed. 91 (1895).

In the present case LDRA has not been fully heard, either before the Commission or the courts of Louisiana. The Commission has steadfastly refused to follow any procedural due process in dealing with LDRA. Apparently the Commission believes that there are no practical limits on its discretion, or any need for it to base its decisions on substantial evidence and reasoned findings. The courts, which must rely on the administrative record and articulated

reasons for the administrative decision cannot conduct an effective judicial review where there is no substantial evidence or reasoned findings. Even if the judicial review is by way of a trial de novo the court conducting the trial de novo must take evidence and put it on the record. Without a record an appeal court has no basis for rendering a decision that comports with due process.

For these reasons this Court should grant a Writ of Certiorari.

B. DENIAL OF EQUAL PROTECTION

In its persecution of LDRA, the Commission at the April 29, 1994 hearing cites the legal basis for its action as LSA-R.S. 4:141, 147, 159 and 160. There is no question that, evidenced by the Commission's prior issuance of a license, LDRA has complied with the applicable provisions of sections 141, 147 and 159.

LSA-R.S. 4:148 reads in pertinent part:

> The commission shall make rules, regulations and conditions for the holding, conducting and operating of all race tracks, race meets and races held in this state and for the conduct of the racing industry in this state under this part. . . .

The record shows that the Commission has not promulgated any rules, regulations or standards which would guide the application of §160. Therefore, the application of this section is subject to the whims of the Commission members, who may arbitrarily and capriciously use this statute to terminate a licensee, without due process, to serve a political purpose which may be contrary to the goals and mission of the Commission as set forth in the statutes. Such conduct is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In State v. Chisesis, 187 La. 675, 175 So. 453 (La. 1937), Chief Justice O'Niell wrote "[6] Adverting to the other reason why the statute in question constitutes a denial of the equal protections of the laws, we find the books full of

decisions to the effect that a state statute or municipal ordinance which undertakes to regulate a lawful business or occupation by conferring upon a designated officer, or commission, or board, the authority, within his or its judgment or discretion, to grant or withhold a license or permit to engage in the business or occupation, and which does not prescribe a rule or standard to which all persons similarly situated may conform, constitutes a denial of the equal protection of the laws. The leading case on the subject, of course, is Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. The Louisiana cases maintaining this principle are: State v. Mahner (1891), 43 La.Ann. 496, 9 So. 480; State v. Dubarry (1892), 44 La.Ann. 1117, 11 So. 718; State v. Kuntz (1895), 47 La.Ann. 106, 16 So. 651; City of New Orleans v. Palmisano (1920), 146 La. 518, 83 So. 789; City of Shreveport v. Herndon (1925), 159 La. 121, 105 So. 247; State ex rel Dickson v. Harrison (1926), 161 La. 218, 108 So. 421; and Baltman Mortuary Service Inc. v. City of New Orleans, 174 La. 360, 140 So. 503."

Furthermore, LSA-R.S. 4:147(6) states:

§147. Specific duties of commission.

(6) To make rules and regulations for the holding, conducting, and operating of all race tracks, race meets, and races held in Louisiana, provided such regulations are uniform in their application and effect.

The actions of the Commission at its April 29, 1994 meeting not only violated the equal protection clause of the U.S. Constitution but its own mandate as stated above. Ostensibly, the grounds for its actions against LDRA are couched within the meaning of §160(6), "continued failure or inability to meet its financial obligations connected with fulfillment of the purpose for which its license was issued." Since no regulations have ever been promulgated, the record of the Commission in dealing with this issue should set forth the guidelines. Although LDRA was not permitted to call witnesses and present evidence as to the previous

Commission rulings, Commissioner Stall opened the door on Louisiana Downs (the last track constructed in Louisiana prior to the issuance of LDRA's license in 1992). (See ***Appendix M, page 29m***). Originally Sawyer Downs was licensed and after four years of failing to get financing, the original applicants sold out to the DeBartolo interests and the track opened six years after the original permit for a referendum was issued. LDRA was denied the right to introduce evidence of the timelines for the construction of Jefferson Downs, Delta Downs, Evangeline Downs, Lindsey Downs and Clarence Downs. Had the Commission followed its mandate to apply its rules equally, there could have been no revocation. The Commission demanded that LDRA provide audited financial statements under rules which applied to operating race tracks, which are quite different from a startup licensee which has not commenced operations. No such scrutiny was required of Evangeline Downs, which has twice filed for bankruptcy relief, or Lindsey Downs which folded for financial reasons, or likewise Clarence Downs and, finally, Jefferson Downs, which surrendered its license based on a prediction of possibly losing money, but was never required to justify its actions.

The record further shows that at the December 2, 1994 meeting, the Commission refused to place LDRA on the agenda so that a $10 million commitment for financing could be considered. At the meeting, LDRA asked that the Commission suspend the rules and by two-thirds vote consider LDRA's application. LDRA was ruled out of order. Immediately thereafter, the Commission voted to suspend the rules to add Old Evangeline Downs, L.C. to the agenda and proceeded to issue a license to take over Evangeline Downs based on a verbal application. There was not even a formal written application as required by law and no financial information provided.

If LDRA has not convinced this Honorable Court, LDRA directs the Court to Assistant Attorney General, Melinda M. Tucker, legal advisor to the Commission, to

make its final argument regarding equal protection. In answer to Commissioner Thomas' question on page 77m of the April 29, 1994 transcript (See ***Appendix M***), Ms. Tucker stated on page 77m-78m:

> I think the problem may be with voting on that right now is that we really need to review--we need to go back and start from square one and we need to review exactly what kind of financial situation--cause we don't even know what the necessary--definition of necessary financial is at this time. We need to probably--we need to see what kind of submission Livingston Downs can make with respect to their financial responsibility to this industry.

This incredible comment came only minutes after the Commission had voted to revoke LDRA's license on the ground that it failed to meet the Commission's financial requirements.

The actions of the Commission clearly violated the mandates of LSA-R.S. 4:147(6) and present to this court a textbook case to support the Louisiana Supreme Court's ruling in Chisesi, supra, and this Honorable Court's ruling in Yick Wo, supra. LDRA's constitutional right to equal protection has been violated and this Honorable Court should correct this inequity.

CONCLUSION

It is ironic that after the revocation of LDRA's license on April 29, 1994, a majority of the Commission members expressed the need for a new racetrack and vowed to help in any way possible (See ***Appendix M, pages 77m-79m***). Yet, on two occasions subsequent to the April 29 Commission meeting, LDRA presented two separate $10 million financing commitments which the Commission refused to consider.

This Honorable Court should grant a Writ of Certiorari in this case to rectify egregious violations of due

process and denial of equal protection by a Louisiana state agency, the Louisiana State Racing Commission. Simply put, should the Louisiana State Racing Commission, for the benefit of and in collusion with the owners of an established racetrack bent on eradicating competition, be allowed to totally disregard all due process and equal protection rights granted to private parties under the U. S. Constitution and state law? Petitioner respectfully urges that it should not.

It is a denial of equal protection when a statute provides that a license can be revoked or withheld when there are no clear guidelines established to justify such revocation, thereby subjecting the licensee to arbitrary and capricious actions according to the whims of the board or commission which issued the licenses.

Respectfully submitted:

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APPENDIX A

The Supreme Court of the State of Louisiana

JEFFERSON DOWNS CORPORATION, INC., ET AL.

VS.

LOUISIANA STATE RACING COMMISSION NO. 2000-C-1067

CONSOLIDATED WITH LIVINGSTON DOWNS RACING ASSOCIATION

VS.

LOUISIANA STATE RACING COMMISSION

IN RE: Livingston Downs Racing Asso.; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. G. Nos. 92-20961, 95-15331; to the Court of Appeal, Fourth Circuit, No(s). 99-CA-1001, 99-CA-1002

May 26, 2000

Denied.

JPV
PFC
HTL
CDK
BJJ
CDT
JTK

MARCUS, J., not on panel.

Supreme Court of Louisiana
Rai T. Daigle
Deputy Clerk of Court
For the Court

APPENDIX B

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

Clerk's Office, New Orleans, Mar 16 2000

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED
JEFFERSON DOWNS CORP., ET ALVLOUISIANA STATE RACING COMM.
No. 99-CA-1001 c/w 99-CA-1002

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C

FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., ET AL.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961 c/w Suit No. 95-13551, Division "G"
Civil District Court for the Parish of Orleans

APPLICATION AND INCORPORATED MEMORANDUM FOR REHEARING EN BANC
(Filed Feb. 28, 2000)

MAY IT PLEASE THE COURT:

For the reasons set forth herein below, Livingston Downs Racing Association, Inc. ("LDRA") hereby applies for rehearing *en banc* with this Honorable Court from the decision rendered February 16, 2000 in the above entitled and numbered cause which affirmed the trial court's judgment dismissing LDRA's suspensive appeal of the Louisiana State Racing Commission's ("Commission") April 29, 1994 revocation of LDRA's licenses. This Court's decision is based on incomplete facts and when all pertinent facts are considered, is factually and legally incorrect. LDRA respectfully urges that a careful examination on rehearing is warranted.

On careful review of this Honorable Court's February 16, 2000 opinion in this matter, it is clear that the material facts in support of this Court's legal conclusions are incorrect. Moreover, the record was so far from complete

that it placed this Court at a distinct disadvantage in ascertaining all material facts relating to this matter. The state of the record is more fully addressed in Section VI, herein below.

I. The settlement agreement between the parties was not properly before this Honorable Court.

Page 2 of this Honorable Court's decision states "to avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996." The settlement agreement and the consent judgment dealt with totally separate and distinct issues. The settlement agreement encompassed the entirety of the agreements made between the parties regarding multiple litigation. The consent judgment executed between the parties on November 15, 1996 was but one issue of six different issues between the parties that are outlined in the settlement agreement executed on November 15, 1996. The only issue in the settlement agreement regarding the instant litigation is "the parties agree to obtain a consent decree in the matter entitled "Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission," No. 92-20961 c/w 95-15331, Civil District Court for the Parish of Orleans in the form annexed as *Appendix A*." The intent of the parties regarding the instant litigation is set forth in the consent judgment which is (or should be) a part of the record of this matter. The settlement agreement is not part of the record of this matter and is not indicative of the intent of the parties with respect to this litigation. Moreover, as the settlement agreement was not part of the record at the trial court, it

should not have been a factor in this Court's decision because it was not properly before this Court.

II. This Honorable Court did not take cognizance of pertinent provisions of the consent judgment, which control this appeal; the issue of whether the Commission properly revoked LDRA's license was not rendered moot by the consent judgment.

This Honorable Court states on page 2, "the specific paragraphs of the consent judgment pertinent to this appeal read as follows: . . . " Paragraphs 6, 7, 8, 9, 15, 16, and 18 are enumerated therein. However, the Court did not take cognizance of the significance of paragraphs 1, 2 and 4 which state:

> 1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.
>
> 2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.
>
> 4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing

years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

The issue of whether the Commission properly revoked LDRA's license without cause was not rendered moot when the parties entered into the consent judgment. In fact, the consent judgment expressly states the opposite. Paragraphs 1 and 2 of the consent judgment clearly contemplate the continuation of this litigation. Furthermore, the aforementioned paragraphs in the consent judgment clearly mandate action by the Commission upon timely receipt of LDRA's application. LDRA timely filed its application on October 30, 1998.

III. LDRA timely filed an application and commitment letter in accordance with Sections 4 and 6 of the consent judgment.

On Friday, October 30, 1998 at 9:35 a.m., LDRA hand delivered the following documents to the Commission offices in New Orleans, Louisiana: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2) a financial statement of Livingston Downs Racing Association, L.L.C.; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for Collateralized Mortgage Financing" issued by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc. Copies of these documents were attached as Exhibit I, *in globo*, to LDRA's opposition to the Commission's motion to dismiss, and therefore, are or should be a part of the record on appeal. Contrary to this Court's

findings of fact (page 4 of the Court's opinion), the commission did not receive these documents via fax, but by hand delivery. Paul Burgess, Executive Director of the Commission at that time, attested to the receipt of these documents by affixing his signature, date and time of receipt to the face of said documents. A date stamped copy of LDRA's opposition filed with the trial court is attached as Exhibit 1. While this Court may not allow introduction of evidence into the record of these proceedings, it is clear proof that the record of this matter is not complete. This Court incorrectly states on page 7 of its opinion that it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page.

IV. Action by the Commission was expressly provided for in the consent judgment.

This Court further states on page 6 "once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment." However, the reverse is true. Once the application and commitment letter were filed by LDRA with the Commission, then the Commission was mandated by the consent judgment to perform the action provided for in the consent judgment, namely conduct an investigation of LDRA's funding sources and act upon the application. Paragraphs 4 and 15 expressly provide for action by the Commission. The manner in which the Commission is authorized to take action is dictated by LSA-R.S. 4:151, et

seq. and LSA-R.S. 49:961, et seq. This Honorable Court has ruled on page 5 of its opinion that the Administrative Procedure Act applies to actions by the Commission.

The Consent Judgment provided that LDRA would file an application on or before October 31, 1998, The application had to include an enforceable commitment letter in the amount of ten million dollars. The Commission then had the duty to investigate the source of LDRA's funding. Upon completion of its investigation the Commission was required to promptly act upon the application. Or, as Paragraph 4 of the Consent Judgment states, "the Commission SHALL consider an application" [to be filed by LDRA]. (emphasis supplied).

This Honorable Court's primary focus is whether LDRA complied with the terms of the consent judgment in the filing of its application. Among other things, this court is basing its decision on semantics (i.e., the fact that the commitment has the word "conditional" in its title and the fact that the commitment does not use the magic word "in an amount not less than ten million ($10,000,000.00) Dollars"). This does not alter the fact that LDRA complied with the consent judgment and filed an application on or before October 31, 1998 together with a commitment letter in the amount of $10,000,000.00.

In *Birchard v. State Bd. of Medical Examiners,* 609 So.2d 980 (La. App. 4th Cir. 1992), Birchard appealed from the board's refusal to grant him permission to practice medicine at a certain hospital, without first giving him a hearing. The board had previously revoked Birchard's license but authorized him to "practice medicine only as an employee of a medical institution approved in

advance by the board." This Court found that Birchard had not appealed the decision revoking his license or placing this condition on him. The court found that Birchrd [sic] was appealing only from the procedure the board used to enforce its decision not to allow him to practice at a certain hospital. The court went on to state "there was nothing in the wording of 'prior approval' condition of probation to even remotely suggest to Dr. Birchard that he would be entitled to a hearing each time the Board exercised its approval process. He had no reason to expect anything other than the unilateral action of the Board in the enforcement of that condition of probation . . . "

In the present case once an application containing a ten million dollar commitment was filed with the Commission, it had no unilateral right to do anything other than conduct an investigation and convene a hearing.

In *Ensenat v. Bd. of Medical Examiners,* 593 So.2d 929 (La. App. 4 Cir. 1992) Dr. Ensenat was brought before the board on various charges. At the hearing he entered into a consent order revoking his license to practice medicine and waiving his right to seek reinstatement for a period of five years. After five years he could seek reinstatement but reinstatement would depend solely upon the discretion of the board. When Dr. Ensenat sought unconditional reinstatement the board offered only conditional reinstatement Ensenat then filed suit to compel the board to reinstate his license to practice medicine or to afford him a full hearing on his application for reinstatement.

The court found that the consent agreement did not give Ensenat the legal right to reinstatment [sic]. In

regard to Ensenat's argument that due process required the board to grant him a hearing the court stated at page 933 that:

> Dr. Ensenat's possession of a medical license gives him a vested property interest, which guarantees him a right to due process prior to revocation of that license. However, by virtue of the 1976 consent order, that property interest was properly extinguished by due process of law, and Dr. Ensenat does not claim otherwise.

In the present case LDRA's possession of a license, even if suspended, gives it a vested property interest, which guarantees it a right to due process prior to being deprived of that license. The consent judgment expressly contemplates and expressly provides that a hearing be held by the Commission upon LDRA filing an application with a ten million dollar enforceable commitment by October 31, 1998. LDRA filed its application together with a signed ten million dollar enforceable commitment on October 30, 1998. Under the consent judgment, LSA-R.S. 4:158 and the Administrative Procedure Act, the ball was then in the Commission's court for it to conduct an investigation and hold a hearing. It did niether [sic].

R. S. 4:158 provides that "the Commission shall convene to consider the refusal or granting of the permits or licenses applied for." The procedure used by the Commission must afford an applicant a fair and proper opportunity to present the merits of the request and to have a determination made after the request is considered. A procedure devoid of staff reports and studies or sworn testimony, and no opportunity for interested parties to confront and cross examine violates due process and "is

not at all consistent with the letter or the spirit of the administrative procedure act." *Jefferson Downs v. La. State Racing Com'n*, 288 So.2d 653, (La. App. 4 Cir. 1974).

In the present case the Commission never convened a hearing to consider the application, much less conducted a proper hearing.

This Court stated on page 5 of its opinion that "once the consent judgment and settlement were approved and entered into in accordance with the Open Meetings Law and Administrative Procedure Act, the parties were bound by the provisions of the consent judgment, over which the trial court expressly retained jurisdiction." Yet, the Court further stated that "nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment." On one hand this Honorable Court states, on page 6, that "pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely." This contemplates action by the ***full commission.***

It is well settled that a representative of a legal entity cannot act without special authorization. For example, the president of a corporation may not sue in the name of the corporation without special authorization from the board of directors to bring the suit. See *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So.2d 660 (La. 1912). In the present case there is no evidence in the record that the Commission gave special authorization to its legal counsel, either in the consent judgment or in an open meeting,

to proceed to act on the application. Absent such special authorization, the Commission's legal counsel had no authority to act on her own. Moreover, pursuant to Paragraph 18 of the Consent Judgment, the trial court retained jurisdiction ***only*** over the enforcement of the consent judgment. Paragraphs 4, 5, 7, 8, 9, 10, 11, 12, 16, and 17 ***clearly*** contemplate and mandate action by the Commission with respect to LDRA's application filed on October 30, 1998.

V. The trial court did not conduct a contradictory hearing, as contemplated by the Louisiana Code of Civil Procedure; LDRA was denied its constitutional right to due process under the state and federal constitutions as well as its constitutional right to be secure in its property without due process of law.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on December 4, 1998, a contradictory hearing did not take place. LDRA refers this Court to its original brief, page 6. Moreover, the trial court did not transcribe any portion of this so-called contradictory hearing. There was no contradictory hearing as found by this Court on page 5 of its opinion. The trial court's actions on December 4, 1998 are set forth in LDRA's original brief filed with this Court. The refusal of a trial court to permit a party to participate in a proceeding in open court and to present that party's case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of that party's right to free access to the courts under La. Const. Art. 1, Section 22. *Zarek vs. Sanders*, 656 So.2d 1038 (La. App. 5 Cir. 1994). Substantive due process is involved in

claims in which action by a state or local government interferes with property interest in an arbitrary or capricious manner. *Standards Materials, Inc. v. City of Slidell,* 96-0684 (La. App. 1 Cir. 9/23/97, 700 So.2d 975.

La. Const. Art. 1, Section 19 provides provides [sic] that "no person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based . . . " This provision is not limited to criminal convictions or forfeitures. See, *Walker v. Stewards of Jefferson Downs Race Track,* 615 So.2d 403, (La. App. 4 Cir. 1993), and *Something Irish Co. V. Rack,* 333 So.2d 773, (La. App. 1 Cir. 1976).

LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then that party's rights under Art. 1 Section 19 are violated. *State v. Clark,* 93-0321 (La. App. 4 Cir. 10/27/94), 644 So.2d 1130, writ denied 94-2884 (La. 3/24/95), 651 So.2d 287.

La. Const. Art 1, Section 22 provides that "all courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." This provision is a mandate to the judiciary. *Crier*

v. Whitecloud, 496 So.2d 305 (La. 1986). See also *Zarek v. Sanders*, supra.

This Honorable Court states that if LDRA was aggrieved by the Commission's ruling or failure to act pursuant to Paragraph 16, it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the Court for appropriate relief. This Court's own ruling contains conflicting opinions. In this section, the Court refers to the "Racing Commission's ruling." In order for the Commission to rule, it had to conduct a meeting pursuant to the Open Meetings Law, which this Court said was not necessary.

LDRA could not seek judicial review by summary proceeding since the commission failed to make an adjudication. The Commission never acted upon LDRA's application. LDRA filed a motion to enforce Paragraph 16 of the consent judgment. That motion, as well as all of the exceptions and a writ of mandamus filed by LDRA (see Section VI herein below), were never heard or considered in the trial court. A terse statement to the effect that "the motion of the Commission is granted and this suit is dismissed" without hearing evidence or oral argument from the parties is a clear violation, under the circumstances of the case, of La. Const. Art. 1, Section 22.

VI. The record on appeal was incomplete; therefore, this Court could not rule on the merits of either the original appeal of the April 29, 1994 license revocation or the appeal from the trial court's dismissal.

LDRA filed three separate motions to order the Clerk of Court for the Parish of Orleans to complete the record

on appeal, all of which are a part of the appellate record. This Honorable Court has twice ordered the appellate record supplemented. However, on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion to order the Civil District Clerk to complete the appellate record and a motion to withhold submission of the case until the record was complete. Undersigned counsel never received any notification that the motions were acted upon.

Among the pleadings missing from the record herein are the following which are germane to the motion to dismiss filed by the Commission which is the subject of the instant appeal:

a. Consent Judgment between the parties filed on November 15, 1996.

b. The Commission's motion to dismiss filed on November 10, 1998.

c. LDRA's motion to continue hearing on the commission's motion to dismiss filed November 18, 1998.

d. The Commission's opposition to LDRA's motion to continue hearing filed November 23, 1998.

e. The trial court's November 30, 1998 order denying LDRA's motion to continue.

f. LDRA's opposition to the Commission's motion to dismiss filed on December 1, 1998.

g. LDRA's motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

h. LDRA's memorandum in support of motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

i. LDRA's dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

j. LDRA's memorandum in support of dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

k. LDRA's petition for writ of mandamus filed on December 3, 1998.

l. The Commission's motion and incorporated memorandum to quash request for production of documents filed on December 4, 1998.

m. LDRA's petition for suspensive appeal filed on December 21, 1998.

n. LDRA's notice of intent to apply for writs filed on December 21, 1998.

o. Trial Court's December 21, 1998 order granting LDRA's suspensive appeal filed on December 21, 1998.

p. LDRA's motion to limit the record on appeal filed on January 20, 1999.

q. Court's notice of estimated appeal cost filed February 8, 1999.

The Civil District Clerk failed to even supplement the record with these seventeen documents which are required for this Court to render its decision.

Moreover, the record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, which the commission supplemented with this Court, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the Commission, nor does it contain LDRA's attempts to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so.

LDRA offered, in both its second and third motion to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate if necessary.

LDRA has made every attempt to have a complete record before this Court. Without a complete record, its constitutional rights under Article 1, Section 19 of the Louisiana Constitution are being violated. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then that party's rights under Art. 1 Section 19 are violated. *State v. Clark*, supra.

VIII. Ownership in LDRA was properly disclosed at the time the application was submitted.

LDRA complied with the provisions of LSA-R.S. 4:147(4) by properly stating the ownership at the time the

application was filed. The commitment provided that at a *later* date LDRA may transfer an ownership interest to parties selected by Remington, at its sole discretion. This clause legally bound only LDRA and Remington. Parties cannot, by contract, supersede state law. Both Remington and LDRA were aware that they must submit any ownership changes to the Commission for its approval. The Commission still had the power and authority to reject, for just cause, any party submitted by Remington. The Commission had the power to deny Remington's participation until such time as it submitted nominees acceptable to the Commission.

The Court, on page 4 of its opinion, addresses the Commission's objections to the application filed in the name of LDRA, LLC. The application was filed by Livingston Downs Racing Association in the name of its **wholly owned subsidiary** to satisfy a condition of the financing agreement. There had been no change in any of the parties to the original LDRA application. It was well within the Commission's discretion to approve the modified application, as it has done prior to and subsequent to LDRA's submission of its application. Had LDRA been allowed to introduce evidence at the December 4, 1998, the Commission transcripts in which the Commission allowed Louisiana Downs and Evangeline Downs to deviate from its application, would be in the record. LDRA was not allowed to do so. Moreover, had the Commission conducted a hearing as it was mandated to do under R.S. 4:158(B) and the consent judgment, this evidence could and would have been introduced before the Commission. LDRA was not allowed to do either, in violation of its state and federal constitutional rights.

VII. Conclusion

This Court's ruling contains conflicting opinions regarding the ***Commission's*** jurisdiction to grant or deny the license application filed by LDRA. Moreover, the ruling contains conflicting legal conclusions based on erroneous or incomplete facts. For the foregoing reasons, LDRA respectfully requests a rehearing *en banc* with this Honorable Court from the decision rendered February 16, 2000 in the above entitled and numbered cause which affirmed the trial court's judgment dismissing LDRA's suspensive appeal of the Commission's April 29, 1994 revocation of LDRA's licenses.

SUBMITTED BY:

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Certificate of Service

I hereby certify that a copy of the foregoing application has been sent to all counsel of record this 28th day of February, 2000.

/s/ J. Marvin Montgomery
J. Martin Montgomery

AND

/s/ J. Marvin Montgomery
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APPENDIX D

JEFFERSON DOWNS CORPORATION, INC., ET AL.	*	**NO. 99-CA-1001 C/W NO. 99-CA-1002**
VERSUS	*	**COURT OF APPEAL**
LOUISIANA STATE RACING COMMISSION	*	**FOURTH CIRCUIT**
CONSOLIDATED WITH **LIVINGSTON DOWNS RACING ASSOCIATION**	*	**STATE OF LOUISIANA**
VERSUS	*	
LOUISIANA STATE RACING COMMISSION	*	

APPEAL FROM
CIVIL DISTRICT COURT, PARISH OF ORLEANS
NOS. 92-20961 C/W 95-15331, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE

Feb. 16, 2000

* * *

MOON LANDRIEU
JUDGE

* * *

(Court composed of Judge Charles R. Jones, Judge Moon Landrieu, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

Livingston Downs Racing Association, Inc. ("Livingston Downs") appeals from a trial court judgment dismissing its suit against the Louisiana State Racing Commission ("Racing Commission"). The trial judge dismissed the suit, finding Livingston Downs failed to comply with the terms of a consent judgment that the parties had entered into on November 15, 1996. We affirm the judgment of the trial court.

At its meeting held on April 29, 1994, the Racing Commission revoked Livingston Downs' ten-year license to conduct race meets. Livingston Downs filed a petition for judicial review of the Racing Commission's action in the Twenty-First Judicial District Court for the Parish of Livingston. By judgment of the Louisiana Supreme Court the matter was transferred to Civil District Court for the Parish of Orleans pursuant to La. R.S. 4:145.1. The case was then consolidated with a related matter, *Jefferson Downs, Inc. et al. v. Louisiana State Racing Commission,* No. 92-20961, Division G, Orleans Parish Civil District Court. After the trial court dismissed the suit as untimely, Livingston Downs petitioned Civil District Court for a suspensive appeal. The trial court denied the suspensive appeal but granted a devolutive appeal. Livingston Downs subsequently filed a writ application to this Court. We granted the writ application and remanded the matter for the granting of a suspensive appeal in *Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission,* 96-1215 (La. App. 4 Cir. 6/5/96), 675 So. 2d 1214, *writ denied,* 9601750 (La. 9/3/96), 678 So. 2d 558.

To avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996. The consent judgment suspended Livingston Downs' license for two years and further provided that within two years Livingston Downs had to submit a new application which included a binding, enforceable commitment letter(s) in an amount not less than ten million dollars ($10,000,000) for the construction of a racing facility, oval and backside or the case would be dismissed.

The specific paragraphs of the consent judgment pertinent to this appeal read as follows:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.
>
> 7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.
>
> 8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).
>
> 9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and

financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc., other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to

> this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

By terms of the settlement agreement, Livingston Downs and the Racing Commission settled other litigation affecting both parties and individual past members of the Racing Commission. Both the consent judgment and settlement agreement were approved at an open meeting pursuant to Louisiana's Open Meeting Law, La. R.S. 42:4.1 *et seq.*, which was conducted in accordance with the Administrative Procedure Act, La. R.S. 49:950.*et seq.*

As the deadline approached, Livingston Downs sent a letter to the Racing Commission requesting a one-year extension. The Commission considered the request at an executive session convened in an open meeting on September 26, 1998, and, shortly thereafter, responded to the request by letter stating that it was committed to abide by the terms of the consent judgment as entered into by the parties.

On October 30, 1998, the Commission received via fax the following documents: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2) a financial statement of Livingston Downs Racing Association, L.L.C; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for Collaterlized Mortgage Financing" by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc.

On November 10, 1998, the Racing Commission filed a motion to dismiss Livingston Downs' suit, arguing that

Livingston Downs failed to satisfy the terms and conditions of the consent judgment. Specifically, it argued that the Conditional Commitment for Collaterlized Mortgage Financing was not a binding, enforceable commitment in an amount not less than ten million dollars. It also argued that contrary to La. R.S. 4:147(4) the conditional commitment allowed for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group. The Racing Commission also objected to the application because it was in the name of Livingston Downs Racing Association, L.L.C. rather than Livingston Downs Racing Association, Inc., the named plaintiff in the suit and consent judgment.

After a contradictory hearing the trial judge dismissed Livingston Downs' suit with prejudice at its cost pursuant to the November 15, 1996 consent judgment.

On appeal, Livingston Downs argues the trial court erred in dismissing its suit for two reasons. First, it contends the Racing Commission failed to take official action to authorize the filing of the motion to dismiss in violation of the Open Meeting Law. Second, it contends the Commission failed to follow procedures set forth under the Administrative Procedure Act relevant to the revocation of a license and the conduct of adjudicatory proceedings. The Racing Commission, on the other hand, argues the only issue on appeal is whether the trial court was correct in finding Livingston Downs had not complied with the consent judgment.

Livingston Downs is correct that the Administrative Procedure Act and Open Meeting Law apply to actions taken by the Racing Commission. The record indicates

that the Racing Commission complied with these statutes when it initially revoked Livingston Downs' ten-year license at an open meeting on April 29, 1994 in Bossier City and when it later approved the consent judgment and concurrent settlement agreement on November 15, 1996. Once the consent judgment and settlement were approved and entered into in accordance with the Open Meeting Law and Administrative Procedure Act, the parties were bound by the provisions of the consent judgment, over which the trial court expressly retained jurisdiction. Nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment.

Livingston Downs' argument that the granting of the Racing Commission's motion to dismiss was an improper adjudication of its license is without merit. The Racing Commission initially adjudicated Livingston Downs' license on April 29, 1994 when it revoked the ten-year license for failure to fulfill the purpose for which the license was granted. The issue of whether the Racing Commission revoked the license without cause, as Livingston Downs' argued in its suit, was rendered moot when the parties entered into the consent judgment and the Racing Commission agreed to suspend the license for two years to allow Livingston Downs to rehabilitate itself. Once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment.

By its terms, the consent judgment anticipated three possible conclusions to the litigation: 1) Livingston Downs timely filed the application including the binding, enforceable commitment letter and the Racing Commission approved the application; 2) Livingston Downs failed to file a timely application including a binding, enforceable commitment letter; and, 3) Livingston Downs timely filed an application with the binding, enforceable commitment letter but the Racing Commission failed to approve or act upon it. In any of these events, the consent judgment clearly provided for a remedy in the district court. Pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely. If Livingston Downs' was aggrieved by the Racing Commission's ruling or failure to act, pursuant to paragraph 16 it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the court for appropriate relief.

The issue before the district court at the hearing on the motion to dismiss was whether Livingston Downs timely filed an application and commitment letter in accordance with the terms of the consent judgment. Whether the trial court considered the issue on the motion to dismiss by the Racing Commission or on a petition by Livingston Downs, it is clear from the record the court considered the issue in a contradictory hearing. In view of this, Livingston Downs cannot argue its license was adjudicated without notice and the opportunity to be heard.

We now address whether the trial judge erred in finding Livingston Downs failed to comply with the terms of the consent judgment.

Under the terms of the consent judgment Livingston Downs had to timely file an application including a "binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinafter." Nonetheless, the faxed application included a document titled "Conditional Commitment for Collaterlized Mortgage Financing" by Remington Financial Group, Inc. This document expressly provided that the loan commitment was not valid unless a copy of the commitment was dated, signed by the borrower and lender and returned on or before November 10, 1998. The application and documents received by the Racing Commission never included a signature page for the conditional commitment. In fact, it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page.

We note that the conditional commitment submitted by Livingston Downs provided for financing in the "maximum amount of $10,000,000" rather than in "an amount not less than" ten million dollars as required by the consent judgment. Also, the conditional commitment provided for ownership in the "project" by unknown persons at the sole and absolute discretion of Remington Financial Group, Inc." This provision conflicts with La. R.S. 4:147(4), which requires a corporate applicant seeking a license to operate race meets to fully disclose the

names of the stockholders and directors of the corporation.

After reviewing the record in this case, we cannot say the trial judge's finding that Livingston Downs' application including the Conditional Commitment for Collaterlized Mortgage Financing did not satisfy the terms of the November 15, 1996 consent judgment was clearly wrong.

Accordingly, the judgment of the trial court rendered on December 4, 1998, granting the Racing Commission's motion to dismiss Livingston Downs' suit against it is affirmed. Our decision herein does not preclude Livingston Downs from reapplying for a license to operate race meets in the future.

AFFIRMED

APPENDIX E

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., INC.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961, c/w No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

ORDER

Considering the foregoing motion;

IT IS ORDERED that the Clerk of the Civil District Court for the Parish of Orleans is hereby directed to complete the record of the appeal of this matter by compiling and forwarding to this Court those documents which include Suit No. 95-15331, Division "G," and/or Suit No. 71,137, 21st Judicial District Court, Livingston Parish, in their caption, *which documents commence* ***April 29, 1994*** *through the present, excluding* those documents whose caption includes Suit No. 97-12435, Division "K" transferred to Division "G."

Said record shall be returnable to the Fourth Circuit Court of Appeal on or before the 20th day of September, 1999.

New Orleans, Louisiana this 20th day of August, 1999.

/s/ Robert J. Klees
Judge,
Fourth Circuit Court of Appeal

APPENDIX F

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., INC.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961, c/w No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

ORDER

Considering the foregoing motion;

IT IS ORDERED that the Clerk of the Civil District Court for the Parish of Orleans is hereby directed to compile and forward complete the record of the appeal of this matter by compiling and forwarding to this Court the documents listed below:

a. Motion for extension of time filed by the LSRC on May 19, 1994.

b. The LSRC's memorandum in support of item 10(b) hereinabove filed June 20, 1994.

c. Joseph Martin's motion to withdraw as counsel of record for LDRA filed on August 22, 1994.

d. Darlene Ransome's motion to enroll as counsel of record for LDRA filed on August 22, 1994.

e. Darlene Ransome's request for notices filed on August 22, 1994.

f. Memorandum in opposition to the LSRC's declinatory exception of improper venue filed by LDRA on September 12, 1994.

g. Supplemental memorandum in opposition to the LSRC's declinatory exception of improper venue filed by LDRA on September 16, 1994.

h. Transcript of hearing on the LSRC's declinatory exception of improper venue.

i. Certified copy of the trial court's September 27, 1994 judgment denying the LSRC'S declinatory exception of improper venue.

j. Notice of intent to apply for writs filed by the LSRC on September 29, 1994.

k. LSRC's application for writs to the First Circuit Court of Appeal filed on October 28, 1994.

j. [sic] Motion for extension of time to file opposition to writ application filed by LDRA on November 10, 1994.

l. Notice from the First Circuit Court of Appeal acknowledging receipt of writ application dated November 14, 1994.

m. Opposition to the LSRC's writ application filed by LDRA on November 18, 1994.

n. LDRA's motion to dismiss the LSRC's writ application filed on November 18, 1994.

o. Written reasons for judgment issued by the 21st Judicial District Court on November 28, 1994.

p. December 1, 1994 decision of the First Circuit Court of Appeal denying LDRA's motion to dismiss the LSRC's writ application.

q. Docket Schedule for hearing LDRA's writ application issued January 13, 1995.

r. LSRC's application for writs to the Louisiana Supreme Court filed on March 24, 1995.

s. LDRA's opposition to the LSRC's writ application to the Supreme Court filed on April 7, 1995.

t. Motion to supplement the record filed by LDRA on April 13, 1995.

u. LDRA's supplemental opposition to the LSRC's writ application to the Supreme Court filed on April 21, 1995.

v. LDRA's petition for rehearing by the Supreme Court filed on May 15, 1995.

w. LSRC's opposition to LDRA's petition for rehearing by the Supreme Court filed on June 2, 1995.

x. LDRA's motion to supplement its petition for rehearing by the Supreme Court filed on June 6, 1995 and the court's notice granting same on June 12, 1995.

y. LDRA's supplemental petition for rehearing filed on June 6, 1995.

z. Supreme Court's June 16, 1995 decision denying reconsideration of LDRA's petition for rehearing.

aa. LDRA's motion to enroll Breazeale, Sachse & Wilson, L.L.P. as additional counsel of record filed April 22, 1996.

bb. The trial court's May 14, 1996 judgment on the LSRC's motion to dismiss.

cc. The trial court's reasons for its May 14, 1996 judgment on the LSRC's motion to dismiss.

dd. LDRA's notice of intent to spply [sic] for writs filed on May 17, 1996.

ee. LDRA's motion fixing time for filing application for writs to the Fourth Circuit filed on May 17, 1996.

ff. LDRA's application and the LSRC's opposition to LDRA's application for writs filed with the Fourth Circuit regarding the trial court's dismissal of the case.

gg. The LSRC's motion and order to substitute counsel filed on August 14, 1996 and the Supreme Court's August 29, 1996 order granting same.

hh. The LSRC's application and LDRA's opposition to the LSRC's application for writs to the Supreme Court regarding the Fourth Circuit's reversal and remand to the trial court.

ii. September 3, 1996 decision of the Supreme Court denying the LSRC's application for writs.

jj. September 4, 1996 notice of pre-trial conference from the trial court.

kk. The LSRC's answer filed on September 30, 1996.

ll. The LSRC's motion to depose Darlene Ransome, attorney of record filed on October 31, 1996.

mm. Trial Order sent by trial court.

nn. Consent Judgment between the parties filed on November 15, 1996.

oo. The LSRC's motion to dismiss filed on November 10, 1998.

pp. LDRA's motion to continue hearing on the LSRC's motion to dismiss filed November 18, 1998.

qq. The LSRC's opposition to LDRA's motion to continue hearing filed November 23, 1998.

rr. The trial court's November 30, 1998 order denying LDRA's motion to continue.

ss. LDRA's opposition to the LSRC's motion to dismiss filed on December 1, 1998.

tt. LDRA's motion to enforce Section 16 of consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

uu. LDRA's memorandum in support of motion to enforce Section 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

vv. LDRA's dilatory exception of prematurity and preemptory exception of no cause of action filed on December 3, 1998.

ww. LDRA's memorandum in support of dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

xx. LDRA's petition for writ of mandamus filed on December 3, 1998.

yy. The LSRC's motion and incorporated memorandum to quash request for production of documents filed on December 4, 1998.

zz. LDRA's petition for suspensive appeal filed on December 21, 1998.

aaa. LDRA's notice of intent to apply for writs filed on December 21, 1998.

bbb. Trial Court's December 21, 1998 order granting LDRA's suspensive appeal filed on December 21, 1998.

ccc. LDRA's motion to limit the record on appeal filed on January 20, 1999.

ddd. Court's notice of estimated appeal cost filed February 8, 1999.

IT IS FURTHER ORDERED that the records listed herein below be supplemented as a part of the record of this matter instead of as exhibits to the record:

a. Petition for trial de novo and for suspensive appeal filed April 29, 1994 by LDRA in the 21st Judicial District Court.

b. Declinatory exception of improper venue filed June 20, 1999 by the Louisiana State Racing Commission ("LSRC").

c. February 24, 1995 decision of the First Circuit Court of Appeal denying the LSRC's writs of certiorari.

d. April 29, 1995 decision of the Louisiana Supreme Court granting writs of certiorari and transferring the case to the Civil District Court for the Parish of Orleans.

e. Motion to transfer (to consolidate with Suit No. 92-20961) filed by Salvador Anzelmo on March 5, 1996.

f. Motion and order fixing time for filing writs filed by LDRA on March 5, 1996.

g. Notice of intent to apply for writs filed by LDRA on March 5, 1996.

h. Motion to dismiss and alternative motion for declaratory judgment filed by the LSRC on April 4, 1996.

i. Opposition to the motion to dismiss filed by LDRA on April 12, 1996.

j. Supplemental opposition to the motion to dismiss filed by LDRA on May 10, 1996.

k. Petition for suspensive appeal filed by LDRA on May 22, 1996.

l. June 5, 1996 decision of the Fourth Circuit Court of Appeal reversing and remanding case to Civil District Court.

m. Motion and order to enroll Marvin Montgomery as additional counsel filed by LDRA on October 18, 1996.

IT IS FURTHER ORDERED that the Louisiana State Racing Commission submit a complete record of the April 29, 1994 hearing pursuant to the Administrative Procedures Act.

Said supplements to the record shall be returnable to the Fourth Circuit Court of Appeal on or before the 2nd day of November, 1999.

New Orleans, Louisiana this 20th day of Oct., 1999.

/s/ Moon Landrieu
Judge,
Fourth Circuit Court of Appeal
for the panel

APPENDIX G

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., ET AL.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961, c/w Suit No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

MOTION TO WITHHOLD SUBMISSION OF CASE FOR DECISION PENDING RECEIPT OF COMPLETE RECORD FILED ON BEHALF OF LIVINGSTON DOWNS RACING ASSOCIATION, INC.

(Filed Nov – 5, 1999)

SUBMITTED BY:

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(225) 928-2620
DARLENE S. RANSOME,
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AND

**BREAZEALE, SACHSE &
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CLAUDE F. REYNAUD,
BAR ROLL #11197
JUDE C. BURSAVICH,
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AND

**J. MARVIN MONTGOMERY
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(225) 931-5860**

MOTION TO WITHHOLD SUBMISSION OF CASE FOR DECISION PENDING RECEIPT OF COMPLETE RECORD FILED ON BEHALF OF LIVINGSTON DOWNS RACING ASSOCIATION, INC.

NOW INTO COURT, through undersigned counsel, comes Livingston Downs Racing Association, Inc. ("LDRA"), appellant herein, who moves this Honorable Court to withhold submission of the captioned case for decision by the panel pending receipt of documents necessary to complete the record of these proceedings for the following reasons, to-wit:

1.

As evidenced by LDRA's second motion to order the Clerk of Court to complete its record on appeal and to order the Louisiana State Racing Commission to submit the administrative record, the record of this matter was far from complete at the time LDRA filed the motion.

2.

This Court ordered that the record be supplemented on or before November 2, 1999.

3.

On Friday, November 5, 1999, a representative of Ransome Law Firm, L.L.C. reviewed the record before this Court and found that it is still incomplete.

4.

Because LDRA has requested a de novo review and decision be issued by this Honorable Court, it is essential that a complete record of this matter be compiled and delivered to the Court by both the Louisiana State Racing Commission and by the Clerk of the Civil District Court for the Parish of Orleans prior to the submission of this case for decision.

5.

Undersigned counsel has no objection to submitting a reply brief on behalf of LDRA nor to appearing and presenting oral argument as scheduled on November 8,

1999. However, LDRA respectfully urges that a complete record on appeal is essential to the proper adjudication of this matter by this Honorable Court.

WHEREFORE, Livingston Downs Racing Association, Inc. prays, after all briefs have been filed and the oral argument of this matter has been presented, that this Honorable Court withhold submission of this case for decision until the record on appeal has been completed by both the Clerk of the Civil District Court for the Parish of Orleans and/or by the Louisiana State Racing Commission.

Respectfully submitted:

RANSOME LAW FIRM, L.L.C.
5353 Florida Blvd.
Baton Rouge, LA 70806
(504) 928-2620

/s/ Darlene S. Ransome
Darlene S. Ransome (#21983)

AND

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Victor A. Sachse, III, Bar Roll #11645
Claude F. Reynaud, Jr., Bar Roll #11197
Jude C. Bursavich, Bar Roll #19303

AND

J. Marvin Montgomery
Bar Roll #8169
P.O. Box 66124
Baton Rouge, LA 70896
(225) 931-5860

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed, postage prepaid and properly addressed to all counsel of record.

Baton Rouge, Louisiana, this 5th day of November, 1999.

/s/ Darlene S. Ransome
Darlene S. Ransome

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., ET AL.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961, c/w Suit No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

ORDER

Considering the foregoing motion,

IT IS ORDERED that the above entitled and numbered cause shall not be submitted for decision until the record of this matter is complete.

IT IS FURTHER ORDERED that the Clerk of Court for the Civil District Court for the Parish of Orleans and/or the Louisiana State Racing Commission shall supplement this record with the documents on the list attached hereto as Exhibit "A" on or before the close of business on the _____ day of _____, 1999.

_____

Judge,
Fourth Circuit Court of Appeal

APPENDIX H

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NOS. 92-20961 c/w
95-15331

DIVISION "G" DOCKET:
SECTION "11"

LIVINGSTON DOWNS
RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * * * * * * * * * *

JUDGEMENT

The above captioned proceeding came for hearing on the merits of defendant, LOUISIANA STATE RACING COMMISSION, Motion To Dismiss on Friday, December 4, 1998:

PRESENT: KIM RAINES CHATELAIN,
Attorney for defendant, Louisiana State Racing Commission

VICTOR A. SACHSE, III
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

DARLENE S. RANSOME
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

After considering the law, the evidence, and for the reasons orally assigned

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana State Racing Commission, dismissing the above captioned suit by plaintiff, Livingston Downs Racing Association, Inc. against defendant, Louisiana State Racing Commission, with prejudice at plaintiff's cost pursuant to the Consent Judgment entered November 15, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 4 day of December, 1998.

/s/ (Sgd) Robin M. Giarrusso
JUDGE

APPENDIX I

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 92-20961 C/W 95-15331 DIVISION G

LIVINGSTON DOWNS RACING ASSOCIATION

VERSUS

LOUISIANA STATE RACING COMMISSION

JUDGMENT

This matter came for hearing on the 26th day of April, 1996 on Louisiana State Racing Commission's (herein after LSRC) Motion to Dismiss and Alternative Motion for Declaratory Judgment.

PRESENT: MELINDA TUCKER and PAUL SENS, Attorneys for mover, LOUISIANA STATE RACING COMMISSION;

DARLENE RANSON, Attorney for LIVINGSTON DOWNS RACING ASSOCIATION

After hearing the pleadings, evidence and argument of counsel:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed by LSRC is hereby granted, dismissing the purported appeal filed by Livingston Downs Racing Association at Livingston Downs' costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other motions are hereby dismissed.

JUDGMENT SIGNED, NEW ORLEANS, LOUISIANA this 14th day of May 1996.

/s/ Robin M. Giarrusso
Robin M. Giarrusso,
Judge Div G

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 92-20961 C/W DIVISION G
95-15331

LIVINGSTON DOWNS RACING ASSOCIATION

VERSUS

LOUISIANA STATE RACING COMMISSION

REASONS FOR JUDGMENT

At issue is whether Livingston Downs took the proper procedural steps to suspend the effect of the order revoking its license. The Court finds that Livingston Downs lost all right to suspensively appeal by its failure to comply with the applicable provision of the racing statutes La.R.S. 4:158.

Some history is in order: The LSRC issued an Order revoking the racing license and privileges of Livingston Downs on April 29, 1994. On the same day, Livingston Downs submitted an order in the 21st Judicial District Court which purported to grant Livingston Downs a suspensive appeal of LSRC's Order and reinstated the

license and racing privileges of Livingston Downs. That Order was signed by a judge of the 21st Judicial District on April 29, 1994.

The LSRC filed an exception of venue in the 21st Judicial District Court, which exception was denied. This denial was affirmed by the First Circuit Court of Appeal. The LSRC sought supervisory writs from the Louisiana Supreme Court. The Supreme Court granted the exception of venue and ordered these proceedings transferred to Civil District Court for the Parish of Orleans. The Supreme Court found that La.R.S. 4:145.1 provides exclusive venue for legal action against the LSRC and that the 21st Judicial District was an improper venue for Livingston Downs' suspensive appeal of the Order of the Racing Commission of April 29, 1994.

It is well-settled that venue for an action against a state agency or commission is jurisdictional and non-waivable. When a statutory jurisdictional venue provision vests exclusive venue in a particular court, only that court has subject matter jurisdiction. See *Mire v. Hawkins*, 147 So. 2d 892 (La. App. 3d Cir. 1962), writ denied, 244 La. 116, 150 So.2d 584, 1963, *Vincent v. Hunt*, 221 So. 2d 577 (La. App. 3d Cir. 1969).

Because the 21st Judicial District Court was not a proper venue for the Livingston Downs Suspensive Appeal and because venue under the provisions of Louisiana Revised Statutes 4:145.1 is jurisdictional, the 21st Judicial District Court lacked subject matter jurisdiction to grant a suspensive appeal from the Racing Commission Order of April 29, 1994. *Vincent v. Hunt*, supra. Therefore, the Order of Suspensive Appeal, granted by

the 21st Judicial District Court on April 29, 1994, is void and of no effect. See La. Code of Civil Procedure article 3: "A Judgment rendered by a Court which has no jurisdiction over the subject matter of the action or proceeding is void." Compare LSA–C.C.P. art 44.

Plaintiff, Livingston Downs, did not move for an Order of Suspensive Appeal from the Courts of the Parish of Orleans, which is the only court with jurisdiction over the Racing Commission. Under the provisions of La. R.S. 4:158, a party aggrieved by the revocation of a racing license or racing privileges must take a suspensive appeal "within ten (10) days of the notification of the commission's decision."

Livingston Downs failed to perfect a suspensive appeal of the Racing Commission Order of April 29, 1994, within the ten (10) days prescriptive period set forth in La. R.S. 4:158 A. Accordingly, Livingston Downs' right to take a suspensive appeal from the Racing Commission Order of April 29, 1994 has prescribed.

Because the Racing Commission's Motion to Dismiss is granted, the Court need not address the Racing Commission's alternative motion.

SIGNED, NEW ORLEANS, LOUISIANA this 14th day of May 1996.

/s/ Robin M. Giarrusso
Robin M. Giarrusso, Judge Div G

APPENDIX J

LIVINGSTON DOWNS RACING ASSOCIATION, INC.	*	No. 96-C-1215
	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
LOUISIANA STATE RACING COMMISSION	*	STATE OF LOUISIANA

ON CERTIORARI TO THE
CIVIL DISTRICT COURT, PARISH OF ORLEANS
NO. 95-15331, DIVISION "J"
HONORABLE ROBIN GIARRUSSO, JUDGE

(Filed June 5, 1996)

PATRICK M. SCHOTT
CHIEF JUDGE

(Court composed of Chief Judge Patrick M. Schott, Judge Moon Landrieu and Judge Patricia R. Murray)

DARLENE S. RANSOME
Baton Rouge, Louisiana 70806

AND

VICTOR A. SACHSE, III
CLAUDE F. REYNAUD
JUDE C. BURSAVICH
BREAZEALE, SACHSE & WILSON
Baton Rouge, Louisiana 70821
(Counsel for Plaintiff-Relator)

RICHARD P. IEYOUB
ATTORNEY GENERAL
MELINDA M. TUCKER
ASSISTANT ATTORNEY GENERAL
PAUL N. SENS
ASSISTANT ATTORNEY GENERAL
New Orleans, Louisiana 70119-5111
(Counsel for Defendant-Respondent)

REVERSED AND REMANDED;
STAY ORDER RECALLED

On the application of Livingston Downs Racing Association, Inc., relator, we grant certiorari in order to consider the validity of the judgment of the trial court granting the motion of Louisiana State Racing Commission, dismissing relator's suspensive appeal from the Commission's decision to revoke relator's license.

Relator was notified that its license "to conduct race meets" had been revoked by the Commission at its meeting held on April 29, 1994. Relator's remedy was set out in LSA-R.S. 4:158 as follows:

> Should the commission . . . revoke an association's license . . . said association may within ten days of the notification of the commission's decision take a suspensive appeal to the district court having jurisdiction over the association's track. Such appeals shall be filed in the district court in the same manner as original suits are instituted therein. The appeals should be tried de novo. Either party may amend and supplement his pleadings and additional witnesses may be called and heard.

On April 29, 1994, relator filed its suspensive appeal in the Twenty-First Judicial District Court for the Parish

of Livingston where relator's track was to be operated. The Commission filed an exception to the venue of Livingston Parish which was overruled by the trial court on September 27, 1994. This judgment was reversed by the Supreme Court on April 28, 1995, with the explanation:

> Exception of venue sustained. La. R.S. 4:145.1. Case transferred to the Civil District Court for the Parish of Orleans.

Although the judgment of the Supreme Court became final on June 16 when rehearing was denied, nothing happened until September 8 when the Livingston Parish Clerk of Court transferred the record to the Civil District Court. On April 4, 1996, the Commission filed its motion to dismiss relator's petition and on May 15 the trial court rendered its judgment granting the Commission's motion and dismissing relator's suspensive appeal. On May 19, relator filed a petition in the trial court for a suspensive appeal to this court, but on May 21 the trial judge denied the suspensive appeal and granted a devolutive appeal. On May 23, relator filed in this court an application for supervisory writs with respect to the May 15 judgment and a request for a stay order. We issued a stay order and secured a response to relator's application prior to the present grant of certiorari.

Before reaching the merits of the judgment of the trial court, we must consider the Commission's argument that the exercise of our supervisory jurisdiction is somehow prohibited by R.S. 4:158. In pertinent part this statute provides the following remedy for the unsuccessful litigant who has taken a suspensive appeal to the district court from a decision of the Commission:

> Within ten calendar days of the signing of the judgment by the district court in any such appeal case, the commission or the applicant for a license or licensee, as the case may be, may suspensively appeal the judgment to the appellate court of proper jurisdiction. These appeals shall be perfected in the manner provided for in civil cases and shall be suspensive or devolutive in the discretion of the court.

While this statute provides the litigant with the right to take an appeal and restricts the time in which such an appeal may be taken to only ten days instead of the general rules found in C.C.P. arts. 2087 and 2123, the statute does not purport to prevent or prohibit the litigant from invoking the supervisory jurisdiction of the appellate court. The power of the court of appeal to exercise its supervisory jurisdiction is conferred by the Constitution, art. V, § 10(A) and is recognized by law. C.C.P. art. 2201. Neither the Constitution nor the statutes prohibit the appellate court from exercising its supervisory jurisdiction in this sort of case.

On the other hand, the difference between supervisory jurisdiction and appellate jurisdiction is that the former is discretionary on the part of the appellate court while the latter is invocable by the litigant as a matter of right. As a general rule, the court of appeal does not exercise its discretionary supervisory jurisdiction in the absence of a showing that the failure to do so will result in irreparable injury. Where an appeal would provide an adequate remedy there would normally be no irreparable injury and the court would not issue certiorari to review the judgment complained of.

We have resolved that this case is an appropriate one for the exercise of our supervisory jurisdiction. The statutory scheme found in R.S. 4:158 leaves no doubt but that the legislature intended for the procedure for judicial review of a decision by the Commission to be expeditious. For example, the ten day period provided for judicial review of a Commission decision contrasts sharply with the thirty day period provided by the Administrative Procedure Act, R.S. 49:964(B). The ten day period for an appeal also contrasts with the normal periods for taking appeals as mentioned above and applicable to the Administrative Procedure Act – R.S. 49:965. Also, R.S. 9:158 specifically mandates the appellate court to give precedence to a case such as this over other civil cases.

The present case is readily susceptible to disposition on the record before us. Furthermore, as will be seen, the judgment under consideration is clearly erroneous. The interests of justice would not be served were we to decline to exercise our supervisory jurisdiction and allow the appeal taken by relator to take its course. To do so would trigger a delay of several months and the ultimate result would clearly be the same as the one we are now prepared to reach. Parenthetically, we note that an inordinate length of time passed between the date when the judgment of the Supreme Court became final and the date the judgment of the district court was rendered. Each party blames the other for this delay, and, while it is not necessary for us to fix the blame for the delay, it does appear that each party bears some responsibility for it. More diligence on the part of either would have provoked a much earlier resolution. In any event, it

behooves this court to put an end to the delay and provide an expeditious resolution of the controversy to the extent that we are able. In reasons for judgment the trial judge found as follows:

> It is well-settled that venue for an action against a state agency or commission is jurisdictional and non-waivable. When a statutory jurisdictional venue provision vests exclusive venue in a particular court, only that court has subject matter jurisdiction. See *Mire v. Hawkins*, 147 So.2d 892 (La. App. 3d Cir. 1962), *writ denied*, 244 La. 116, 150 So.2d 584, 1963, *Vincent v. Hunt*, 221 So.2d 577 (La. App. 3d Cir. 1969).

The trial judge reasoned that the filing of relator's petition for suspensive appeal in Livingston Parish, which lacked subject matter jurisdiction, was without effect and could not interrupt the ten day prescriptive period set out in R.S. 4:158 for filing such action. This reasoning is erroneous. In the *Mire* case, suit was filed against the Conservation Commissioner in the Parish of Acadia. An exception to the court's lack of jurisdiction over the person of the defendant was filed because law required the suit to be filed in East Baton Rouge Parish. The appellate court held that the exception was properly sustained because East Baton Rouge Parish was "the proper *venue* for bringing suit." In that case, the trial court had also sustained an exception to the court's lack of jurisdiction over the subject matter which was based upon the plaintiffs' failure to exhaust administrative remedies, but the appellate court pretermitted discussion and disposition of this exception.

Similarly, in the *Vincent* case the court affirmed the trial court's judgment again on the ground that only East Baton Rouge Parish and not St. Charles Parish was the proper venue for a suit against the Commissioner of Conservation. Unfortunately, the *Vincent* court engaged in some erroneous dicta with respect to non-waivable or so called "jurisdictional" venue found in C.C.P. art. 44. However, this article provides that venue may not be waived only in certain specified types of proceedings, none of which has application to the action in the *Vincent* case or to the present case.

The trial court in the present case as well as the Third Circuit in the cited cases seem to confuse jurisdiction over the person, C.C.P. art. 925(5) and improper venue, art. 925(4) with jurisdiction over the subject matter, art. 925(6). This article flatly declares that all the exceptions of art. 925 except as to subject matter may be waived including venue and jurisdiction over the person. Consequently, the trial court erroneously equated subject matter jurisdiction with personal jurisdiction and venue. Finally, C.C.P. art. 932 provides that an action brought in a court of improper jurisdiction or venue may be transferred to a proper court.

In the present case the Supreme Court held that relator's suit was filed in a court without venue over the Commission, and pursuant to art. 932, it transferred the case to the court of proper venue. Even though filed in the wrong venue, service on the Commission was made within the ten day period prescribed by R.S. 9:158 so that prescription was interrupted. C.C. art. 3462.

Accordingly, the judgment of the trial court dismissing relator's suspensive appeal from the Commission's ruling is reversed and set aside. The case is remanded to the trial court for proceedings in accordance with R.S. 9:158. This court's stay order of May 23 is recalled.

REVERSED AND REMANDED;
STAY ORDER RECALLED.

APPENDIX K

The Supreme Court of the State of Louisiana

LIVINGSTON DOWNS RACING ASSOCIATION

VS. **NO. 96-CC- 1750**

LOUISIANA STATE RACING COMMISSION

IN RE: Louisiana State Racing Comm.; – Defendant(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number-96CW-1215; Parish of Orleans Civil District Court Div. "J" Number 95-15331

September 3, 1996

Denied.

WFM

HTL

CDK

BJJ

JPV

CALOGERO, C.J. not on panel.

WATSON, J. would grant the writ.

BLEICH, J. would grant the writ.

Supreme Court of Louisiana
September 3, 1996

/s/ Illegible
Clerk of Court
For the Court

APPENDIX L

LIVINGSTON DOWNS RACING ASSOCIATION	NUMBER: 71137 DIVISION: F 21ST JUDICIAL DISTRICT COURT
VERSUS	PARISH OF LIVINGSTON
LOUISIANA STATE RACING COMMISSION	STATE OF LOUISIANA

PETITION FOR TRIAL DE NOVO AND FOR SUSPENSIVE APPEAL

(Filed April 29, 1994)

NOW INTO COURT, through undersigned counsel, comes Livingston Downs Racing Association, Inc. (Livingston Downs) who with respect represents as follows:

1.

Made defendant herein is Louisiana State Racing Commission, an agency of the State of Louisiana.

2.

Livingston Downs is a racing association duly licensed by the Racing Commission to conduct live horse racing meets in Livingston Parish.

3.

On April 29, 1994, the Racing Commission suspended and/or revoked Livingston Downs' license, and/or terminated the racing privileges granted to Livingston Downs

4.

Pursuant to LSA – R.S. 4:158(A) Livingston Downs is entitled to a suspensive appeal from the decision of the Racing Commission suspending and/or revoking Livingston Downs' license and/or terminating Livingston Downs' racing privileges.

5.

Pursuant to LSA – R.S. 4:158(A) the appeal from the ruling of the Racing Commission shall be filed in the district court having jurisdiction over Livingston Downs' track, which is 21st Judicial District Court for the Parish of Livingston, and such appeal shall be filed in the same manner as an original suit.

6.

Pursuant to LSA – R.S. 4:158(A), the appeal from the decision of the Racing Commission shall be tried de novo.

7.

Pursuant to LSA – R.S. 4:160, the Racing Commission may only suspend and/or revoke Livingston Downs' license and/or terminate Livingston Downs' racing privileges for "just cause," and the Commission did not have just cause to suspend and/or revoke Livingston Downs' license or to terminate its racing privileges.

WHEREFORE, Livingston Downs prays:

I. That the Court immediately grant Livingston Downs a suspensive appeal from

the decision of the Racing Commission suspending and/or revoking Livingston Downs' license and/or terminating Livingston Downs' racing privileges;

II. That the Racing Commission be cited to appear and answer this Petition within the delays provided by law;

III. That there be trial de novo on the decision of the Racing Commission to suspend and/or revoke Livingston Down's license and/or terminating Livingston Downs' racing privileges;

IV. That after due proceedings had, there be judgment herein in favor of Livingston Downs and against the Racing Commission, reinstating Livingston Downs' license, and reinstating Livingston Downs' racing privileges;

V. For all relief that is just and equitable under the circumstances.

Respectfully Submitted,

By Attorneys,

DUPLECHAIN & MARTIN
A Professional Law Corporation
4949 Essen Lane, 12th Floor
Baton Rouge, La. 70809
Telephone: (504) 769-1206

By: /s/ Joseph R. Martin
JOSEPH R. MARTIN
(BRN#14169)

PLEASE SERVE:

The Louisiana State Racing Commission
through its Chairman, Oscar Tolmas
320 N. Carrollton Ave.
Suite 2-B
New Orleans, La. 70119

LIVINGSTON DOWNS RACING ASSOCIATION	NUMBER: 71137 DIVISION: F 21ST JUDICIAL DISTRICT COURT
VERSUS	PARISH OF LIVINGSTON
LOUISIANA STATE RACING COMMISSION	STATE OF LOUISIANA

ORDER

(Filed April 29, 1994)

Considering the above and foregoing Petition for Trial De Novo and for Suspensive Appeal, and after considering the law concerning the right of Livingston Downs Racing Association, Inc. to suspensively appeal from the decision of the Racing Commission suspending and/or revoking its license and/or terminating its racing privileges;

IT IS ORDERED, ADJUDGED AND DECREED that Livingston Downs be and hereby is granted a suspensive appeal from the decision of the Racing Commission on April 29, 1994 suspending and/or revoking Livingston Downs' racing license and/or terminating Livingston Downs' racing privileges;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the license of Livingston Downs Racing Association, Inc. be and hereby is reinstated and the racing privileges of Livingston Downs Racing Association, Inc. be and hereby are reinstated until further of this Court.

Livingston, Louisiana this 29th day of April, 1994, at 11:45 A.M. o'clock a.m.

/s/ _____
JUDGE, 21ST JUDICIAL
DISTRICT COURT

lm

[1]

LOUISIANA STATE RACING COMMISSION

MEETING OF THE LOUISIANA
STATE RACING COMMISSION
HELD ON FRIDAY, APRIL 29, 1994 AT 9:00 A.M.
IN THE GRAND BALLROOM, GRAND ISLE HOTEL
(FORMERLY QUALITY INN),
AT 3033 HILTON DRIVE
BOSSIER CITY, LOUISIANA 71111.

REPORTED BY: SYLVIA C. PASTRANO
CERTIFIED SHORTHAND REPORTER

- 0 -

CERTIFIED
A TRUE COPY
/s/ Paul D. Burgess
Executive Director
Louisiana State Racing Commission

[2]
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MR. TOLMAS:

Will the commissioners please be seated. The meeting will now come to order. We now have the commissioners roll call, please.

BY MR. BURGESS:

Q. Oscar Tolmas?
A. Present.
Q. W. C. Littleton?
A. Here.
Q. Albert Stall?
A. Present.
Q. Payton Covington?
A. Present.
Q. R .J. D'Agostino?
A. Present.
Q. Sue Granger?
A. Present.
Q. Cynthia Morrell

MR. STALL:

Absent.

Q. Peter Smith?
A. Present.
Q. James Thomas?
A. Present.
Q. Dale Vinet?

[4]

A. Here.
Q. Melinda Tucker?
A. Here.
Q. Tino Rieger?
A. Present.
Q. Jimmy Gregoire?
A. Here.
Q. Charles Webb?
A. Here.

Q. Judy Dugas?
A. Present.
Q. Mr. Lee Berwick?
A. Here.
Q. Mr. Bill Fogelman?
A. Here.
Q. Mr. Mervin Muniz?
A. Here.
MR. BURGESS:
We also have Mr. Brent Seward with Mervin.
Q. Mr. Al Ransome?
A. Here.
Q. Mr. Joe Martin?
A. Here.
Q. Mr. Ray Tromba?

[5]

A. Here.
Q. Charles Salley?
A. And Jimmy Magallis.
Q. Lieutenant Robinson?
A. Here.
Q. Dr. Steven Barker?
A. Present.
Q. Dr. Kamerling?
A. Present.
Q. Harold Delahoussaye?
A. Here.
Q. Mr. James Gelpi?
A. Here.
Q. Johnny Beech?
A. (There was no answer.)
Q. Mr. Tom Early.
A. (There was no answer.)
Q. Mr. Leverne Perry?
A. Here.
Q. Dr. Norwood?
A. (There was no answer.)

Q. Are there any members of the press that would like to recognized at this time?

A. (There was no answer.)

MR. TOLMAS:

[6]

We will now read the minutes of the previous meeting. Motion in lieu of reading the minutes.

MR. STALL:

So moved, Mr. Chairman.

MR. TOLMAS:

It's been moved the reading of the minutes be waived. Is there a second?

MR. PETER SMITH:

Second

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is approved. Now go to the approvals and ratifications. Delta Downs.

MR. BURGESS:

Mr. Chairman, we have the days for 94-95 meet for Delta Downs. The thoroughbred racing season: Racing on the flat for 86 days from September 16, 1994 through March 26, 1995 with 10 races Thursday, Friday, Saturday, post time 6:15 p.m. and 10 races on Sundays and holidays at 1:15 p.m. February the 19th through March the 26th, 1995. The 1995 quarter horse racing season: Racing on the flat for 56 days from March 31, 1995 through July 4, 1995 with 10 races Thursday, Friday, Saturday, post time 6:15 p.m. and 10 races Sundays and holidays with a 1:15 p.m. post time.

The wagering format is exacta wagering on all races except the first; trifecta wagering on six races. Quinella wagering on all races. Two daily doubles; pick 3 on races seven, eight and nine. Delta Downs will be serving as concessionaire for both race meets.

MR. TOLMAS:

Ms. Dugas, as steward at Delta Downs, state steward at Delta Downs have you read all this and approved it?

MS. DUGAS:

Yes, I have.

MR. TOLMAS:

Let the record reflect that.

MR. STALL:

So moved for approval, Mr. Chairman.

MR. PETER SMITH:

I second approval.

MR. TOLMAS:

[8]

All in favor of the motion say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is approved. Mr. Burgess.

MR. BURGESS:

The next item is ratification for request to simulcast entire race cards via common pool wagering from Sportsman's Park, the dates on page three on the agenda; from Garden State Park, the dates on page three; to Wyoming, dates on page three, to LeBois State Park, dates on page three. That concludes all for Delta.

MR. TOLMAS:

There is a motion for ratification.

MS. GRANGER:

I move for approval.

MR. TOLMAS:

Second?

MR. VINET:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

[9]

Aye.

MR. TOLMAS:

Motion is approved. Evangeline Downs.

MR. BURGESS:

Ratification of simulcast via common pool wagering from Keenland, dates as listed on page three. From Garden State Park, dates as listed on page three. To Garden State Park, dates as listed on page three. From Hialeah, dates as listed on page three. From Santa Anita Park, dates as listed on page three. To Trinity Meadows, dates as listed on page four. To Atlantic City, dates as listed on page four. From Sportsman's Park, dates as listed on page four. From Churchill Downs, dates as listed on page four. From Hollywood Park, dates as listed on page four.

MR. VINET:

So moved.

MR. PETER SMITH:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

[10]

Opposed? (None) Motion is approved.

MR. BURGESS:

Mr. Chairman, the next item for Evangeline is filed simulcast OTB agreements with Delta Downs, the Fair Grounds at its OTB locations, Winners Circle OTB in Alexandria, Winners Circle OTB in Mound and Louisiana Downs.

MR. PETER SMITH:

Moved.

MR. VINET:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

All opposed? (None) Motion carries.

MR. BURGESS:

The next item is ratification of designated races at Evangeline Downs as listed on page four and approved by the state steward.

MR. PETER SMITH:

So moved.

[11]

MR. VINET:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is approved.

MR. BURGESS:

Fair Grounds requests approval for 1994-95 racing season. The Fair Grounds -- Mervin, you have requested to go with option two?

MR. MUNIZ:

Fair Grounds would elect to go with option No. 2 -- Thursdays through Mondays schedule for our next meeting.

MR. TOLMAS:

Thank you.

MR. BURGESS:

And the option two schedule appears on page four of the LSRC agenda.

MR. PETER SMITH:

I move.

MS. GRANGER:

[12]

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None)

MR. TOLMAS:

Approved.

MR. BURGESS:

Next item is betting format for the Fair Grounds: Up to 12 races daily; exacta and quinella on all races; five trifectas daily; super 6 on races three through eight; rolling pick 3 beginning on fourth race; two daily doubles on race one and two and the last two races.

MR. TOLMAS:

You need to read the next item, Paul.

MR. BURGESS:

And the Fair Ground also requests Fair Grounds Corporation as concessionaire and caterer.

MR. TOLMAS:

Is there a motion?

MR. PETER SMITH:

[13]

I move.

MR. VINET:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Approved.

MR. BURGESS:

Mr. Chairman, we have an item on page five for the Fair Grounds request to simulcast entire race cards via common pool wagering from Santa Anita Park, dates as

listed on page five. From Keenland, dates as listed on page five; from Churchill Downs, dates as listed on page five.
MS. GRANGER:
Move for approval.
MR. VINET:
Second.
MR. TOLMAS:
All in favor of the motion say aye.
COMMISSION MEMBERS:
Aye.
MR. TOLMAS:
[14]
Opposed? (None) Motion is approved. Livingston Downs.
MR. BURGESS:
Mr. Chairman.
MR. TOLMAS:
The first item on the agenda deals with the -- go ahead.
MR. BURGESS:
Go ahead, Mr. Chairman.
MR. VINET:
Mr. Chairman, I think Louisiana Downs had a request that maybe we could take them before Livingston Downs because they have a race track to open tomorrow.
MR. MARTIN:
We have no objection to that, Mr. Chairman.
MR. VINET:
If you could change the agenda.
MR. TOLMAS:
Louisiana Downs.
MR. BURGESS:
Mr. Chairman, the first item under Louisiana Downs is ratification of C. L. Webb as state steward for the 1994 race meet.
[15]
MS. GRANGER:

Move for approval.

MR. STALL:

Do we know his credentials?

(Laughter)

MR. TOLMAS:

Everybody knows Mr. Webb.

MR. TOLMAS:

Is there a motion?

MR. STALL:

So moved.

MR. THOMAS:

Second.

MR. TOLMAS:

Is there a second?

MR. THOMAS:

Second.

MR. TOLMAS:

All in favor of the motion.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion carries. Congratulations, Mr. Webb.

MR. WEBB:

[16]

Thank you, I appreciate it.

MR. BURGESS:

Next item for Louisiana Downs is ratification of request to simulcast entire race cards via common pool wagering is Hollywood Park, dates as listed on page five. From Sportman's Park, dates as listed on page five. From Thistledown, dates as listed on page five. From Remington Park, dates listed on page five. From Fonner Park, dates as listed on page five. From National Jockey Club, dates as listed on page five. To Oaklawn Park, dates as listed on page five. To Arapahoe Park, dates as listed on page five.

To the following associations from April 30 to November 13, 1994: Atokad Park, State Fair Park, Garden State Park, Douglas Racing Corporation, Manor Downs, Columbus Races, Bandera Downs, Race Cards, Limited. To the Meadowlands, dates as listed on page five. That is all of the items under there.

MR. PETER SMITH:

I move.

MR. VINET:

Second.

MR. TOLMAS:

All in favor of the motion say aye.

COMMISSION MEMBERS:

[17]

Aye.

MR. TOLMAS:

All opposed say no? (None) Motion is adopted.

MR. BURGESS:

We now return to Livingston Downs.

MR. MARTIN:

Mr. Chairman, we have no objection if you wanted to dispose of that Louisiana Quarter Horse Breeder Association for approval of the 1995 Mardi Gras Futurity and Derby, if you want to go ahead and do that.

MR. TOLMAS:

Yes, let's dispose of that. Louisiana Quarter Horse Breeders Association. Paul.

MR. BURGESS:

Request approval for the 1995 Mardi Gras Futurity and Derby.

MS. GRANGER:

I so move.

MR. PETER SMITH:

Second.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

[18]

Aye.

MR. TOLMAS:

Opposed? (None) Motion is approved.

Livingston Downs. The first item on the agenda is the application for license to operate OTB facility per revised statute 4:213 and 214 (D). Ms. Tucker will fill us in.

MS. TUCKER:

On April the 18th of this year, Judge Keogh in case No. 399,563, Division "M" of the 19th Judicial District Court of Parish of East Baton Rouge rendered a Judgment granting the Motion for Summary Judgment filed on behalf of the State of Louisiana and intervenor of the Fair Grounds and against the plaintiff, Livingston Downs, and dismissed the lawsuit which was filed by Mr. Martin on behalf of Livingston Downs at their cost. And in his written reasons for judgment which were rendered on April the 12th, Judge Keogh upheld the constitutionality of the 1986-87 provision in the Rules of Racing which would preclude Livingston Downs from obtaining a license to conduct off-track wagering. I have not received anything from Mr. Martin that indicates that that matter is going to be appealed; however, with respect

[19]

to the commission, the issue is final.

MR. MARTIN:

We have filed our appeal yesterday. It is not a suspensive appeal for anything, so Judge Keogh's decision stands. I would point out to the commission, and I think Ms. Tucker was there and understands, Judge Keogh did rule on the constitutionality, and he did rule on certain conflicts that we pointed out in the statute, however Judge Keogh's written reason's did address the conflict that appears in Section 213 of the off-track wagering law which grants any association licensed by the commission, which would include Livingston Downs, the right to engage in off-track wagering facilities and the other two definitions contained in section 211 of the

off-track wagering law which purport to limit that right to associations that were licensed in 1986-87. Judge Keogh did state from the bench that he thought it was the responsibility of the racing commission to resolve that statutory conflict. We have made this application, and we want to be very clear that this application applies to what we refer to -- for a lack of statutory definition -- a better word is an on-site, off-track wagering facility which would be an off-track only at the facility in Livingston Parish. It would

[20]

not include rights to be in any other parish. It would not include rights to have any other off-track wagering facility, so we still believe that there is a statutory contradiction that exists that should in the first instances be resolved by the racing commission, and we would ask the racing commission to take a look at those two statutes that I mentioned.

If you look at 214 (D) which gives us the right to have the on-site, on-track betting parlor, we believe that the definitions that we have complained of for a couple of years now do not come into play, if you read section 213 and Section 214. So, by this application, we are asking for the sole right to operate on site. Of course, if we never built the site, we wouldn't have the right.

MR. STALL:

Mr. Chairman, may I ask a question.

MR. TOLMAS:

Mr. Stall.

MR. STALL:

Aren't these 213, 214, they are all predicated on conducting live racing first?

MR. MARTIN:

There is an argument to be made for that and an argument to be made on the other side. You see

[21]

the position we have always been in, we have always been in the position of somebody that wants to go out and build a house. You don't build a house and then go for a building

permit. If we have clearly defined rights going in, if we have the right to operate an on-site OTB at the facility that we build, then this is all going to be pertinent in the next issues that we discuss in the financing and everything. We have continually met with folks that were interested in the racetrack project with the proviso that, when you clarify your off-track betting situation, come back to see us, and we will be happy to talk to you then.

So, we are in a catch 22. We are in a position that we are going to have to really test it, we are going to have to go out and build a racetrack and then come and see. If we have a ruling that, if and when we build a racetrack, we will have a right to operate that racetrack as an off-track wagering facility, we can do the project.

MS. TUCKER:

Mr. Martin, wouldn't it have been more prudent to change the off-track wagering statute first rather than go build a racetrack and then come and say, but we don't like the fact that the 86-87 provision precludes us from the off-track betting

[22]

facility? It sounds like the cart before the horse to me.

MR. MARTIN:

Immediately after Mr. Ransome initially applied to this commission for anything in October of 1992, in the regular session of 1993, Livingston Downs approved two or three different bills. I know it was two bills before. I don't remember the proposal that we sent in, but the first bill that we did was to remove the definitions in 211, five and seven that had the definitions that restricted off-track wagering facilities to those associations licensed in 1986 and '87. That is exactly what we did, Ms. Tucker. We are citizens of this State, and we know that we go to our legislators to make those proposals. That is what we were trying to do. There were -- I can't remember the biggest thing going on in the 1993 legislature, but our legislation never made it out of committee. At that time we were under the Commerce

Committee which now the name changed to Department of Economic Development, but it is still the same committee, the same committee members. That legislation never made it out of committee. We will reintroduce it. We can't introduce it this time. I guess maybe we could say it was a fiscal matter. If we

[23]

get it, there is going to be a lot of tax revenues, but we simply can't get it through this session. Next session we will try again.

MR. STALL:

Mr. Martin, realizing the fact that all the tracks that now exist in the State of Louisiana were there first and then OTB followed. It is a catch 22, but statute is clear, as far as I am concerned, and I am not a lawyer, but I have been advised obviously by the judge's decision. But of all the tracks in the U.S. that I know of, I don't know of any, including the ones being built, like the one opening today in Texas and the others, that the track was up and running before they got the right to conduct as an OTB parlor when they were dark or when they were not racing live races. I know (inaudible-overlap) is not that way and I know the one in San Antonio is not and I know that Sam Houston is not. Those are three newest o that I know of, class-one tracks.

MR. MARTIN:

I understand what the concern is, belive me. The concern is, and I think it's been voiced by Ms. Tucker, and I don't think it's ever been officially voiced by the racing commission, but we should get this out in the open. The concern is that

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Mr. Ransome and Livingston Downs will go to Livingston Parish and open a truck stop and in addition to that have a license to operate a racetrack. Under that scenario, they will be able to put unlimited amounts of video poker machines in and operate as a truck stop, would not limit it to 50 video poker machines, but have unlimted video poker machines

and come back to this commission for year after year and never open the racetrack. We are working on it, give us a little more time, we are going to get it going. That is a legitimate concern, and we are willing to do anything that this commission wants us to do to address that concern. The license can be issued provisionally. It can be issued provisionally that we are not allowed to do anything other than the truck stop license limited to 50. We are not allowed to do it until the racetrack is under construction, it looks like we have a real project out there.

MR. STALL:

Who issues the truck stop license?

MR. MARTIN:

That is the state police.

MR. TOLMAS:

We would be infringing on their jurisdiction if we start limiting the companies to

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machines or truck stops or motels also or whatnot.

MR. MARTIN:

Chairman Tolmas, this is not the first -- believe me. Some of you folks have been through the whole history of Livingston Downs what we have tried to do. You start off with a proposition when we had to go get the referendum election. Livingston Parish had to give the Secretary of the State 45 days notice, but the police jury had to call the election within 30 days. Everything we have done, we are stuck with the body of law that we have, and unfortunately, nobody ever read the thing through trying to reconcile all the differences.

MR. TOLMAS:

This is not unique for Livingston Downs. Everybody has these same laws. Everybody had to abide by these same law.

MR. MARTIN:

That's correct, but nobody has tried to open a racetrack since Louisiana Downs came in to. Am I correct,

they are the last ones to be licensed? Before that time and since that time.

MR. TOLMAS:

The laws have not changed since then, have they?

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MR. MARTIN:

Yes, they have. The Election Code has come in, the Off-Track Wagering Law has come in, and that happens when you start. You have one body of law in 1980, then you amend it in '83, '86, all the way up, then you pass the Election Code. You start overlaying all these provisions that apply to the same subject matter. We have been faced with horrible contradictions in statutes, and we have done it the only way possible, starting from just calling the referendum election. If you read the two statutes, literally, it's impossible to have a referendum. We did it the only way it was possible to do to comply with the Election Code and the horse racing statutes, and we have caught flack for doing it that way ever since. We still do.

All we are trying to do is get a racetrack built, and we understand the concerns that this racetrack, believe me, Livingston Parish folks don't want us out there just running a huge truck stop with unlimited video poker machines for years, installing and building the racetrack. Everybody wants the racetrack built. That is we want, too.

MR. THOMAS:

Can I ask Mr. Martin a question?

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MR. TOLMAS:

Yes.

MR. THOMAS:

Mr. Martin, we have been through this, you said since 1992, and I think I sat on the commission when you all were talking about wanting a license or wanting the investigation of a license, the emergency of us acting on it as fast as we could was for you all to build the racetrack.

MR. MARTIN:

Yes, sir.

MR. THOMAS:

The racetrack was the most important thing. There wasn't anything about video poker, or it wasn't anything about OTB. In other words, the horsemen needs a racetrack.

MR. MARTIN:

Yes, sir.

MR. THOMAS:

Jefferson Downs closed, we need a racetrack. That was the whole -- the whole point that we were delaying and holding up from getting a racetrack started. We had the financing, we got everything going. You -- we give you the permit. Now you can't build the track. We can't build the track,

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our track is no good unless we have OTB. So, I mean, you all are sitting here hammering the same thing and the whole intent the way I see it is that, all you wanted was the OTB to start with.

MR. MARTIN:

I hope I would be able to convince you otherwise. On December 10th, 1992, this commission voted unanimously to grant Livingston Downs the license which enabled it to go to Livingston Parish and apply for referendum election. On December 11th, the other five racetracks filed suit to block that effort. It would take me some doing, Mr. Tolmas, to sit and count the number of lawsuits and the number of efforts that have been made to prevent -- just simply prevent Livingston Downs from getting to that referendum election: The lawsuit filed in Orleans Parish to challenge this commission's unanimous ruling. The lawsuit filed in Livingston Parish to try to block the election. Motions made in Orleans Parish litigation to stop the Secretary of State from printing ballots. Polls done in Livingston Parish financed in part by the Committee to Control Gambling which was financed in part or in whole by Jefferson Downs and Fair Grounds. It's been a bloody battle, Mr. Thomas. In

any project, in order to get you financing forward, from whether

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it's a bank or investor or anything, it has to be financially viable. Without the ability to operate at least the racetrack facility, and it's got to be a racetrack facility. It can't just be -- we could take a road crater out there, cut a circle and get some Mardi Gras grandstands and run racing. We have actually considered that.

MR. THOMAS:

Well, the point I am getting at, I understand all the problems, but I don't think the racing commission has brought all those up.

MR. MARTIN:

You haven't, but.

MR. THOMAS:

The point I am asking you, is what is holding you up from building the track today or pulling up and opening this racetrack? What is holding this up? Can you tell me that?

MR. MARTIN:

Yes, sir. Our inability to tell either a lender, a traditional lender, such as a bank or a life insurance company or an investor who would take money out of his pocket and put into the project. Our inability to tell either a lender or an investor that we do have or do not have any rights or some

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rights to operate as an off-track wagering facility. Under section 149.2, which is not in the Off-Track Wagering Law, which was passed I believe in 1983, before that, before off-track wagering came in, it's called "other track wagering." If we have those rights, if we simply had those rights, we would have a project that the performance would show to be financially viable, that it wouldn't be --

MR. THOMAS:

Can I ask one more question, and I will be through.

MR. MARTIN:

Yes, sir.

MR. THOMAS:

From what all I can gather then is that you didn't have all this when we issued the permit?

MR. MARTIN:

I mean we have to get a permit first.

MR. THOMAS:

Like you said, building a house, but you don't need a permit unless you have money to build a house. You don't get a permit and say, look, I got a permit to build a house, let's build a house --

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that scenario you used. The point I am saying, Mr. Martin is, did you all ask for the permit and hope to get the permit to get financing and use the permit to get financing, or was your intent, you had financing to build the track when we issued it?

MR. MARTIN:

No, there was no commitment to finance when the permit was issued.

MR. THOMAS:

So you were going to use the permit to make --

MR. MARTIN:

First we had to get referendum license.

MR. THOMAS:

If you wouldn't have had the referendum, you would not have had the permit. That is all I want to ask. If you didn't have a permit, then you wouldn't have --

MR. MARTIN:

Mr. Ransome wants to address that question.

MR. RANSOME:

Mr. Thomas.

MR. THOMAS:

[32]

Yes.

MR. RANSOME:

Your concern is like my concern, and what really we are asking the commission and what investors had said, when the industry --

MR. TOLMAS:

Swear in Mr. Ransome, please.

AL J. RANSOME,

after having been first duly sworn, testified as follows:

MR. RANSOME:

When this industry went to the legislature and said we have to have off-track wagering because the industry cannot survive on live racing alone and operating on just a limited number of days, we have to operate year round, I think if you look at the financial statements of every racing association, theat Louisiana Downs doesn't have OTB's, but they have a right operate year round at their site, and it's the only thing keeping Louisiana Downs in business. Delta Downs has no OTB's. It has the opportunity to operate year round and produce additional income rather than let this racing plant stay idle for nine months.

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This entire industry said that that had to happen in order for this industry to survive. What we are asking is not for the Fair Grounds off-track betting parlors, not for Evangeline Downs off-track betting parlors, but the right operate year round like all other ones. OTB is not the issue. The right to operate year round; that is all we are asking. That is primary.

MS. TUCKER:

OTB is the issue if you are asking to operate year round, because you cannot simulcast at times when you are not running live racing.

MR. TOLMAS:

This is all out of order. The question you are making now is the fourth item on the agenda under Livingston Downs. What we are addressing now is the application you made sometime go that was tabled by the commission untill the ruling -- there was a judicial determination ruling by Judge Keogh while the case was pending there. This ruling

has come in, and we need to clear this motion of tabling the request off the books. The chair will entertain a motion to that effect.

MR. STALL:

Mr. Chairman.

MR. TOLMAS:

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Mr. Stall.

MR. STALL:

I make a motion in order to deny Livingston Downs the right to conduct off-track wagering.

MR. TOLMAS:

Is there a second?

MR. THOMAS:

Second.

MR. TOLMAS:

All in favor of the motion say aye.

MR. PETER SMITH:

I have a question on the motion.

MR. TOLMAS:

Yes, sir.

MR. PETER SMITH:

Is that denied or to be considered later if they are running?

MR. STALL:

Sure, if the track was up and running.

MR. PETER SMITH:

I think, if you answered me, that this just denying at the present time, and if the track was up and running following procedures of all

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other tracks.

MS. TUCKER:

Let me just clarify for the the record that I do not agree with Mr. Martin's interpretation of Judge Keogh's judgment. I don't think that Judge Keogh did not address provision 213 in the statutes. I think what Judge Keogh said

was that Livingston Downs may not have off-track betting and an off-track betting license, period. What the court said was that the denial of off-track wagering is not an off-track wagering permit to Livingston Downs by the Louisiana State Racing Commission is consistent with the Off-Track Wagering Law codified at revised statute 4:211, et seq..

MR. PETER SMITH:

That answered my question.

MR. MARTIN:

Would Ms. Tucker agree with me that Judge Keogh did not mention, address, or consider other track wagering under 149.2?

MS. TUCKER:

No, I would not.

MR. MARTIN:

Would you point out where he addressed that in his decision.

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MS. TUCKER:

That was discussed in argument, and as Judge Keogh said in his judgement, he went back and revisited everything that was argued at the hearing on the preliminary injunction, which I believe was held in the fall of 1993, and he went back and reviewed all of the statutory provisions which had to do with the arguments that were made that day, and he had said that, that is a legitimate exercise of the state policing power to deny to Livingston Downs off-track betting privileges.

MR. MARTIN:

Is it the commission's position then that Livingston Downs does not have any rights whatsoever under section 149.2?

MS. TUCKER:

149.2 does not deal with off-track wagering. It deals with simulcast wagering.

MR. MARTIN:

Other track wagering.

MS. TUCKER:

Other track wagering?

MR. MARTIN:

That's correct.

MS. TUCKER:

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There is a distinction between simulcast wagering and being an off-track wagering facility. Livingston Downs may not be an off-track wagering facility.

MR. MARTIN:

We understand the distinction. We understand the distinction. Our second request is that we have some clarification of our rights under section 149.2 which is clearly designated as "other track wagering" and was passed some three, four years before off-track wagering came into existence in the state.

MS. TUCKER:

When we get to that agenda item, we will address that.

MR. MARTIN:

Can we do that agenda item next instead of the other two, because I have filed exceptions to the other two items?

MR. TOLMAS:

Let's continue the agenda as it is. We have a motion on the floor and it been seconded.

MR. TOLMAS:

All in favor of the motion say aye.

COMMISSION MEMBERS:

Aye.

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MR. TOLMAS:

Opposed? (None) Motion is approved.

MR. TOLMAS:

We now to come to the agenda item: Commission review of Livingston Downs financial statement and conditions as per revised statute 4:141, 147 and 159.

MR. MARTIN:

Mr. Chairman, we filed two exceptions to these items. Under section 955 of the Administrative Procedure Act, Livingston Downs is entitled to notice that includes -- just like you give your jockeys and your grooms, your hot walkers who are accused of corrupt practices -- using the buzzer or something, you have to give them statutory number and statement of facts of what they did, what the accusations are. Under 955, we are entitled to that.

So our argument is that your notice of meeting doesn't set forth what you wish from us or want from us or anything that you think we have done that is not in compliance with the racing statute.

MS. TUCKER:

Mr. Chairman, I would offer in response to that an April 13 letter addressed to

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Mr. Ransome and sent by certified mail, which details the agenda item that is going to be heard at the April 29th meeting, and I would also -- I offer as Exhibit No. 1. I also offer as exception number 2, a subpoena issued to Mr. Al J. Ransome which states in pertinent part that this hearing is to be held to determine the eligibilty of Livingston Downs to reinstate its racing license as provided in the revised statute 4:147 (4) (a) through (g) revised statute 4:159 (1) through (13) and revised statute 4:160 (1) through (6) and also is a Subpoena Duces Tecum requesting specific documents. I would also offer to the commission as exception Exhibit No. 3 a suboena issued to Mr. Al J. Ransome which states in pertinent part that this hearing is being held to determine the financial condition of Livingston Downs Racing Association pursuant to revised statute 4:147 and revised statute 4:159 and 4:160 and also requests specific documents to be presented today. My argument to the commission, Mr. Chairman, is that not only was Mr. Ransome given notice by certified letter, he was given notice by two separate subpoenas, and he was also advised at the last racing commission meeting that this matter was going to be placed

on the agenda for consideration, and I ask you to deny the exception.

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MR. MARTIN:

That is one exception. Our second exception is that, under section 961 C of the Administrative Procedure Act, we are entitled to what has become known as a Bertucci hearing. Mr. Gelpi is in the audience. As you know, Mr. Gelpi represents several other agencies. If you have any questions concerning what a Bertucci hearing is, Mr. Gelpi might be willing to answer any of your questions. Bertucci hearing involves under section 961 C under the Administrative Procedure Act before you can institute an adjudicatory hearing which we are involved in at this moment, you must give Livingston Downs under the Administrative Procedure Act -- Livingston Downs must have the opportunity to informally present matters to the Racing Commission which shows we are in compliance with 160 and 147 and the statutes cited in there, an informal opportunity to present that material to the commission to show that we are in compliance with the law. Livingston Downs has no desire to hide anything or do anything in secret from this commission. I have suggested, and I suggest again that the way to address this is not to take a vote on it today. If you take a vote on it today, we have to proceed with everything after this under our objection.

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We are going -- possibly lead to more litigation. We have had enough. We don't want any more litigation with this commssion or anybody else. We do want to comply with the law.

We would like to inform the commission on our efforts to get this project off the ground, to let you know the financial condition, so forth and so on. What we suggest is that the commission form a subcommittee. We will be willing to meet with the subcommittee today and sit down and give a full report to the subcommittee on what is going

on with the project, what efforts we have made to get it off the ground, where we stand on other issues. We would welcome the opportunity to do that. I think we might be able to -- I think maybe the commissioners would then -- then that committee can report to the commission. That is not a secret meeting. That is a meeting provided for by the Administrative Procedure Act. We are doing nothing behind anybody's back. That is what we are entitled to under the law and under the case called Louisiana Board of Medical Examiners versus Dr. Bertucci. That is why they call it Bertucci hearings now. We are entitled to that, and we ask for that opportunity to meet with the subcommittee of the commission and give them -- we will be willing to give

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you more information than we are obligated to give under the statute.

At this stage of the game and at this stage of the project, we are here before a board that governs all of our competitors and our potential competitors. No one in our position relishes the idea of laying all of their business plans and proposals and negotiations out to public scrutiny to their competitors at this point. Even under the Freedom of Information Act under which this commission is subject to, there are provisions that say, this body can't release certain information supplied to it because it's commercially sensitive, trade secrets, whatever, so we are asking for that opportunity.

MR. STALL:

Mr. Chairman, may I ask a question, please.

MR. TOLMAS:

Mr. Stall.

MR. STALL:

Mr. Martin, unless I am gravely mistaken, I have been to all the meetings but one since, cause I was in California, and I don't ever remember ever having the -- with the exception of the financial situation when the then judgment agains

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Mr. Tolmas for that large sum of money, you know, I don't ever remember hearing who the financial backers were, how much money it was. We have asked over and over. I think Mr. Ransome said he is not at liberty at this time to say who they were, or he said numbers -- how much he wanted to spend, but this is an ongoing thing, most unusual, I mean. If you and I were going to try build a house or a racetrack or whatever, we would go to the bank and have the money lined up before we went into trying to buy a piece of ground, this, that and the other. Every track we have been around -- and we have seen some fail.

MR. MARTIN:

Louisiana Downs took four years, Linzey Downs never got off the ground.

MR. STALL:

Louisiana Downs did not take four years. They had money up front and Mr. DeBartelo came in and bailed out Kenneth Wilson and Wolcutt (phonetic); they never stopped. They fact of the matter, they opened their race meeting -- I guess I should not say that, but that is exactly what happened, you know, or -- we're gonna be like Earl long. You say -- yes, I lied.

Anyhow, but that happened, I was

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there, and I know, and -- I lost my train of thought. Of course, there was no OTB at that time at all, I realize that. It actually opened up in the winter, in the winter time with the glass not even all in, rather than not have racing start. But that is the kind of not here. Every track has always had their money lined up, lined up front. A guy from Eagle Downs that owned an island on the Mississippi River, he had 3800 or something in the bank, but he owned land and everything -- built a bridge to it. We told him no back then until he came up with financing, and he obviously couldn't come with it. This is a most unusual situation, and this has been going on and on and on almost meeting after meeting. I know it's

not -- I am in the business of raising money, so I know money is tight out there.

MR. MARTIN:

If you are in the business of raising money --

MR. STALL:

I raise oil and gas. I don't know a lot about building a race track. I just go to a lot of them.

MR. MARTIN:

It is not as politically charged,

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it is not as morally charged. There are institutions that based on moral and religious reasons that would not loan money to this project cause it involves gambling. Everybody understands the controversy --

MR. STALL:

I raise money for oil land gas. Two wildest things I have ever done in my life --

MR. MARTIN:

It is wild and speculative; I agree. It's difficult to raise money on oil and gas ventures, but at least you don't have deal with the moral objections.

MR. STALL:

Without arguing about that, if you have an oil spill, you have to do a lot of dealing, big dealing. Let's not talk about the oil business. We are here to talk about the racing business. I know something about what it's like to raise money and a lot of it.

MR. MARTIN:

Then you understand what happens and how difficult it is to raise money when the day after you get your -- really December 10th was a permission slip to go to Livingston Parish and ask for a referendum election. The day after we got that, we

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are in court. We are in court, and there was a stay obtained that obviated -- our point.

MR. STALL:

Let me ask this: Do you have the money lined up?

MR. MARTIN:

I would like a ruling on --

MR. STALL:

I understand.

MR. MARTIN:

I don't mean to be rude, Mr. Tolmas. I would like a ruling on some exceptions so I know what my client's rights are. I am not being rude and don't mean to be stubborn or anything, but we have important and valuable property rights involved here. I am going to ask that the commission rule on my exceptions before I answer any other questions, because if you overrule my I exceptions, then I have to object and, any proceedings that follow that, I have to do them under protest to preserve my client's rights. I am not trying to be rude, I am trying to effectively represent my client.

MR. STALL:

I want you to understand. I don't mean anything against your client. We would not have

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given race days if we didn't think you wouldn't be up and running long ago.

MR. MARTIN:

Again, I am doing my very best. There have been hard feelings of acrimony between Livingston Downs, myself and this racing commission, and I am trying my best to -- It's a new page. I am saying we do need to do business with each other, we do need to get along, but I do need to preserve my client's rights. I don't want to answer that question that you just asked me until I have a ruling on my exception.

MS. TUCKER:

May I respond to Mr. Martin's request. I never did receive a copy of the exceptions. Fortunately someone else who received a copy gave it to me yesterday afternoon; however, I think that there was plenty of time for Livingston

Downs to approach this commission in the form of a settlement rather than the morning of the meeting; and I think we ought to proceed, and I am asking you to deny the exceptions.

MR. MARTIN:

That is the kind of the thing we have been trying to avoid.

MR. TOLMAS:

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Mr. Martin, you had notice every meeting that the commission was interested in financing of Livingston Downs. You wait till the 11th hour and then come forward with exceptions for a committee. Why didn't you do this last meeting in March when the question was raised about your finances? Why didn't you raise this exception two weeks or three weeks ago when that certified letter was sent out putting this on the agenda? Why didn't you answer that from the subpoenas, raise this question when the subpoenas were sent out? You wait till this morning and bring these exceptions out before this commission. The chair calls for a vote on the exceptions.

It's my understanding that the legal opinion of our counsel recommends that we deny the exceptions; is that correct?

MS. TUCKER:

That's correct.

MR. COVINGTON:

You want a motion on that?

MR. TOLMAS:

Yes, sir.

MR. COVINGTON:

I so move.

MR. TOLMAS:

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Is there a second?

MR. STALL:

Second

MR. TOLMAS:

All in favor of the motion for denial say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is approved. Exceptions are denied.

MR. STALL:

Let me ask you, it's not germane but I see Lee sitting back there. Lee what year did you open your racetrack?

MR. BERWICK:

1973.

MR. STALL:

Just about the same time as this race track?

MR. BERWICK:

A year earlier.

MR. STALL:

Year before, didn't you?

MR. BERWICK:

[50]

Yes, I did.

MR. TOLMAS:

We will proceed.

MR. MARTIN:

At this time, I would renew my request that the racing commission appoint a committee and that Livingston Downs be allowed --

MR. TOLMAS:

That was denied, Mr. Martin, in the motion.

MR. MARTIN:

That was not part of the --

MR. TOLMAS:

You made it an informal exception, and the exceptions you presented today were denied.

MR. MARTIN:

The exception was one of insufficiency of process and one of prematurity.

MR. TOLMAS:

I thought you made this in the form of an exception?

MR. MARTIN:

No, sir. Again, Mr. Tolmas, I am no trying to be obstreperous. I am just trying to be very clear. We lawyers get like that. I apologize for

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being one. But I do request that the commission appoint a subcommittee and allow Livingston Downs to report to the subcommittee on the two agenda items. That is separate and apart from our exceptions to the hearing. So, if you would, would you please take a vote on that request.

MR. TOLMAS:

We need a motion to that effect in order to vote.

MR. MARTIN:

I would request that somebody -- the request. You can deny my request.

MR. TOLMAS:

I deny your request.

MR. MARTIN:

Thank you. For the record, any further participation by Livingston Downs or its counsel in this matter is under objection of protest. We have certain rights under the --

MR. STALL:

In globo from here on?

MR. MARTIN:

Until we get -- I asked that we take the 149.2 issue out of order and put it before this, but that request was denied, too. It depends on

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the outcome of this portion of the hearing what happens. The 149.2 request may be moot.

MS. TUCKER:

Are you asking us that we take 149.2 agenda item out of order because that is going to be the basis of your financing? In other words, if this commission would give to you what you are hoping they would with respect to simulcast, are you saying that then you can argue to this commission that you will now be able to get the financing? Is that the reason why?

MR. MARTIN:

Pardon?

MS. TUCKER:

Is this the basis? Is the simulcast issue at the Livingston Downs racetrack site the basis upon which you are depending on getting your financing?

MR. MARTIN:

Are we into the hearing on Livingston Downs eligibilty to retain its license?

MS. TUCKER:

No. No, we are not. You just asked to take that out of order, and my question to you, Mr. Martin, was whether or not you wanted to do

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that because that would then allow you to argue that you would be able to get your financing?

MR. MARTIN:

I will state right now. If that item is resolved, then it makes the financing either through a traditional lender or through an investor, exactly as I told you earlier when we were discussing the 213, 214 (D) issue, without those rights clarified, we are in total limbo. We certainly can't tell an investor anything. If we tell an investor anything about it, then you are involved in the Securities and Exchange Act of 1930, 1933, and you can commit securities fraud, without some sort of clarification as to where it is. That is when you are dealing with an investor. When you are dealing with the bank. you have to tell them pretty accurate information, too, otherwise you are committing bank fraud. All we can tell an investor or a lender at this point is we don't know.

So, with the clarification, Ms. Tucker, it will be easier. I do not intend to then, if the commission rules on that issue, say the commission ruled favorably on that issue, would I then say okay, now we have the financing. No, we are not that far along. Althought, I would be happy to sit down

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and show you letters from folks who write and say, as soon as you have any of your off-track wagering issues resolved, we are very much interested, we are very much interested in the project. It's a fact of life. I don't know if I have answered your question, Ms. Tucker.

MS. TUCKER:

Yes, you have.

MR. TOLMAS:

We want it straight here. Let's get back to the agenda. The second item on the agenda of Livingston Downs is the commission's review of Livingston Downs' financial statement and conditions per revised statute 4:141, 147 and 159.

MR. MARTIN:

Mr. Chairman, in connection with those two items and in connection with the second item --

MR. TOLMAS:

No, that is just one item.

MR. MARTIN:

I meant in connection with both of them. They are both -- they are both interrelated as I see them. I have prepared a return on the Subpoena Duces Tecum that was sent to Livingston Downs, and

[55]

again we do this under protest. We object to the --

MR. TOLMAS:

Do you have copies for all the commissioners?

MR. MARTIN:

No, I have one copy at this point. If you want to take a small recess and let all the commissioners look it over.

MS. TUCKER:

What we could do, while someone is copying that maybe, is go over the return and see exactly what you do have available to the commission.

MR. MARTIN:

Could the commission go through the return for Mr. Ransome's subpoena request? Since we are in this hearing, we also object --

MS. TUCKER:

We are going to go through our subpoena request, first.

MR. MARTIN:

I will put an objection on the record, Ms. Tucker. Livingston Downs requested that the commission issue several subpoenas and Subpoena Duces Tecum to various witnesses. Under the horse racing statutes, we are entitled to have such subpoenas

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issued under the Administrative Procedure Act. We are entitled to have such subpoenas issued. We are entitled to subpoena witnesses and put on a hearing. It's called due process of law under the Constitution of Louisiana, United States of America and the Administrative Procedure Act. The commission --

MR. TOLMAS:

Mr. Martin.

MR. MARTIN:

I will finish my presentation for the record, Mr. Tolmas. The commission flatly refused to subpoena any witness, any document, anything whatsoever to Livingston Downs request, we therefore state for the record that we are woefully unprepared to address this meeting, to put on any case whatsoever, that we have been denied fundamental due process rights to call witnesses and to put on the case by the commission. So we proceed again under protest due to the fact that we have been denied even the most basic rights to put on a case to call witnesses, so we have no such rights.

So, if you want to go through the subpoena return, we will do that.

MR. TOLMAS:

Yes, sir.

MS. TUCKER:

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I would like to respond to Mr. Martin on the record.

MR. TOLMAS:

Ms. Tucker.

MS. TUCKER:

Mr. Martin indicates that Livingston Downs' due process rights are being violated because they are not able to proceed with the presentation to this commission today. Mr. Ransome and Livingston Downs were subpoenaed to appear before this commission today, Mr. Chairman, not make a presentation, but in order to answer questions that this commission has concerning the financial viability of the Livingston Downs Racing Association. The Rules of Racing, in particular, Code Article 4, Article 153, Revised Statute 4:141, revised statute 4:160, and those are not exclusive, provide for the commission to inquire into the financial stability of any licensee. Mr. Ransome was subpoenaed to appear before this commission today, not to make presentation, but to answer questions, and I would like to note for the record, that Mr. Ransome has been given great latitude by the commission over the last 18 months, almost 18 months in appearances before this commission and presentations, lengthy presentations that he has made.

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Not only did they include the December 10th, 1992 meeting which comprised approximately two hours per the testimony and presenting of evidence by Mr. Ransome; but on January 1, 1993, Mr. Ransome appeared before the commission; on April the 15th, 1993; on May the 27th 1993, at which time Mr. Ransome made an extensive presentation to the commission concerning the reason why it was necessary for him to obtain racing dates. And at that time, part of the

reasons that were propounded to the commission why it was necessary for him to receive racing dates was that it was necessary for them to get him the proper financing. That was a lengthy presentation to the commission.

August 26, 1993, when there was a separate request for racing dates, Mr. Ransome was entitled to make a lengthy presentation to the commission. On December third of 1993, Mr. Ransome made a presentation to the commission, and as late as January 27th of this year when Mr. Ransome requested off-track betting rights, the commission granted him an extensive time to make a presentation of approximately one hour, to argue his case. I think that Mr. Ransome has more than adequately -- more than fairly been treated by this commission. I think it is time for Mr. Ransome to simply answer the questions that this

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commission has concerning the financial stability of Livingston Downs Racing Association, and I do not see that as a violation of anyone's due process rights.

MR. MARTIN:

If it leads to a motion that removes the license, Ms. Tucker, I think you are totally wrong. Our right is -- you have sent us, according to Ms. Tucker, adequate notice that the commission is proceeding with an adjudicatory hearing to suspend or revoke Livingston Downs license. That is her first position. Her second position now, is that, notwithstanding the fact that we have adequate, that you are going to take our license today, we have no right to present witnesses or to call witness in our defense. That is exactly the position taken by Ms. Tucker. You have begun an adjudicatory hearing for which we have no right to present evidence --

MR. PETER SMITH:

The witnesses you are referring to is witnesses that is on the memorandum that we received -- that each commissioner received? Track owners?

MR. MARTIN:

I am not for sure which memorandum you received, Mr. Smith.

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MR. PETER SMITH:

The request from the director who was subpoenaed here?

MR. MARTIN:

Yes, sir.

MR. PETER SMITH:

I fail to see how going into the other race tracks would involve any part of financing condition. We all have -- my understanding is that we are only asking for to be completed an incomplete financial statement that was furnished to us some time ago -- $500 and $17 million? I am sure you understand what I am referring to?

MR. MARTIN:

Yes, sir.

MR. PETER SMITH:

So that makes it incomplete. This is the only thing that Mr. Ransome had to do himself, furnish correct or approve to us -- take statement -- finance statement he furnished to us. Is that adequate or inadequate? And give us -- if it's inadequate, give us some other. That is the way I am looking at it. We are not here to hammer anyone now. This simply could change the picture of everything if this were corrected. I can't see why other racetracks have to be

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involved.

MR. MARTIN:

I understand your position, Mr. Smith, but the way due process works is we get to call witnesses. If this commission decides that the evidence we put on is irrelevant, then you can ignore evidence, but we are entitled to call witnesses and put on our case, and we have been denied fundamental right to call witnesses and put on in this case.

Now, I understand it is very clear to me what your view of this meeting is. Your legal counsel has a completely

different view of what the meeting is all about. Your legal counsel has clearly for the record stated that we are in the midst of an adjudicatory hearing for which we have had notice, the subject of which would be the revocation and suspension of Livingston Downs' license. And I understand --

MR. PETER SMITH:

So you see that two attorneys are interpreting something one way, the other one is interpreting something another way. That will happen as long as you have more than one attorney involved or opposing sides. (Laughter)

MR. MARTIN:

That is great. We have enough

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attorneys up here, but the problem I have is the commission's attorney has now told me I am in the midst of an adjudicatory hearing, so it is no longer a friendly exchange of information. Ms. Tucker has informed us we are in the middle of adjudicatory hearing and my client has had adequate notice of it. The object of it is in the notice to perhaps revoke, suspend, or withdraw Livingston Downs license.

Again, my approach was, let's do this on a friendly basis, delay this matter on the docket, form a subcommittee, and let us meet with you, and we will tell you, answer anything you want to know, but don't do it under this format, which we have been clearly informed is now a hearing to revoke our license. So that is how I have to treat it now. And Ms. Tucker is not denying me. She has been very quick to correct me other times.

MS. TUCKER:

Are we ready to proceed?

MR. TOLMAS:

Yes, let's proceed.

MS. TUCKER:

We have a return on the Subpoena Duces Tecum, Mr. Martin, and I received a letter from you with respect to this first item on the agenda.

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MR. MARTIN:

I think I need one item from my briefcase, Ms. Tucker.

MR. MARTIN:

I have the subpoena. You are talking about the eight items?

MS. TUCKER:

I think you responded with respect to item No. 1, that would be provided, a current financial statement would be provided?

MR. MARTIN:

That is in the packet.

MS. TUCKER:

That is in the packet that is being copied right now for the commissioners?

MR. MARTIN:

Yes, ma'am.

MS. TUCKER:

With respect to item No. 2.

MR. MARTIN:

Current financial statement of Al J. Ransome, we have declined to produce that.

MS. TUCKER:

Item No. 3, current financial statement of all officers and directors of Livingston

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Downs Racing Association?

MR. MARTIN:

We have declined to produce those.

MR. TOLMAS:

Will you name the current officers, directors of Livingston Downs Racing Association?

MR. MARTIN:

Al Ransome is the sole shareholder of Livingston Downs Racing Association. Al Ransome is the president and chairman of the board of Livingston Downs Racing Association. Two other members: Mr. Valene and Mr. Broadhead. Officer positions, I couldn't -- I believe Mr. Broadhead probably occupies the position of secretary of the corporation or maybe vice-president as well. But those are the only officers and directors of the Livingston Downs Racing Association. Those have remained constant since the day the first application was made.

MR. TOLMAS:

You say Mr. Ransome is a sole stockholder? Shareholder?

MR. MARTIN:

Yes, sir.

MR. THOMAS:

Would you say Mr. Broadhead was the

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vice-president, secretary and treasurer?

MR. MARTIN:

I don't know. He is one of the officers. The corporation --

MR. TOLMAS:

Maybe Mr. Ransome would like to tell us who the officer --

MR. RANSOME:

He will be general manager when the project gets off the ground. The only person with an active role in active in Livingston Downs is myself.

MR. MARTIN:

And me, but I am not an officer or director.

MR. TOLMAS:

You are getting paid for you time.

MR. COVINGTON:

Mr. Chairman.

MR. TOLMAS:

Mr. Covington.

MR. COVINGTON:

I understand that Livingston Downs is a corporation; is that correct?

MR. MARTIN:

That's correct.

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MR. COVINGTON:

Is it a Louisiana domiciled corporation?

MR. MARTIN:

It's a domestic corporation.

MS. TUCKER:

Item No. 4: A true copy of any option on any land where the proposed racing facility is to be built.

MR. MARTIN:

We have provided that in the package.

MS. TUCKER:

Item No. 5: Documentation of the current status of any title defects on the land where the proposed racing facility is to be built.

MR. MARTIN:

We have provided that in a package, and if the commission likes, again, subject to the protest and under objection, I can give the commission a detailed brief. I can give a relatively brief history of what is going on with that piece of land out there.

MR. TOLMAS:

Suppose you give us that.

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MR. MARTIN:

It's at Highway 61. No. This is embarrassing. I always forget the intersection. It's the Livingston Frost exit -- I forget the highway number -- on Interstate 12. Now, directly across highway, not interstate, but directly across from the other quadrant of the property is SECO's solid waste site. That site has been closed by the EPA and that has led to a couple of the -- one of the banks we are talking about has requested a phase one environmental survey of the property

which is underway at this point by Mr. Fairburn. It's a letter in the packet I provided. The piece of property was owned by the Heck family. Probably Mr. D'Agostino knows the Heck family. There is quite a few of them. Mrs. Heck -- one of the Hecks -- Wallace, there was a bankruptcy involved, an undivided interest by a person in bankruptcy. There is an undivided interest in the succession. In every option we get, there are about 11 signatures that have to go on them just to get an option or extension signed. The RTC, the Resolution Trust Corporation is liquidating the savings and loan mortgage on the property, and FDIC, the institution that regulates banks had mortgage on at least a portion of the property. If any of your gentleman have ever dealt with

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either of those entities, it's like moving molasses on a cold winter day. They just don't do anything. Releases had to be obtained. The title company, I believe Stewart Title, Mr. Kevin Toups had to approve any such releases. Deadlines came and went. The options came and went. The Heck family has been very cooperative. We have gotten extensions at every step of the way when there was a title problem, and there have been numerous title problems in particular approvals of the sucession and approvals of the bankruptcy court. Part of this problem is now part of the Mrs. Heck's bankruptcy problems. All approvals we had to get were obtained and they were in place. Now, First National Bank of Denham Springs, one of the entities that we are talking about on financing the actual acquisition of the 268 acres, when the EPA, DEQ, EPA and Department of Environmental Quality decided they wanted to close the SECO facility which is across the highway from our proposed site, as all banks are -- anybody who deals in -- you know how banks can get about any kind of environmental problem. They requested a phase one environmental survey.

MR. STALL:

Is there a toxic waste problem?

MR. MARTIN:

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We don't think there is one.

MR. STALL:

That is what the EPA thinks?

MR. MARTIN:

There is a hazardous waste facility that is not that far from it. You can see it; it's not in the site, but it's been closed, it's been encapsulated. There was concern there would be water seepage across the road and across into our proposed site. The phase one environmental survey is underway. We have received the -- that contingency is provided for in the options, so we believe that we are in our option period and the Hecks also agree with us. In fact, the Hecks have agreed to sign another option period that would extend it to 45 days if a phase two environmental survey is required.

So, if the phase one environmental survey comes back with a clean bill of health, no problems, then we will probably be able to go to closing very quickly on the entire 268-acre tract of land. If the phase two environmental survey is required, that will probably take another 30, 45, 60 days; then we have another extension on the option in the works and agreed to by the Hecks. I believe it's being circulated and signed among the Heck family now.

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So, that is where we stand. As you can see, it has not been an easy piece of property to buy.

MR. TOLMAS:

So, what you are saying, Mr. Martin, as of this date, you don't have a clear title that could be closed?

MR. MARTIN:

That's correct.

MR. TOLMAS:

You have a cloud on the title. So, even if you were able to have the financing and everything in place to build this track, you couldn't do it because you don't have a clear title to the property?

MR. MARTIN:

At this point we do not have the -- both the lending institution and the title company which I believe is Stewart Title have requested a phase one environmental survey, Mr. Tolmas.

MR. TOLMAS:

This is required by law?

MR. MARTIN:

It's not required by law. It's required by the title insurance company and the potential lender, the bank.

MR. TOLMAS:

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They have to get a building permit, you have to go through the environmental process? Even the federal government has stepped in on this now. I don't know if in Livingston Parish they do it, because in Orleans Parish they do it.

MR. MARTIN:

Potentially we are going to have to deal with the Wetlands Act. There may be a couple of pieces, portion of the property out there that remain underwater for a certain amount of time of the year. We don't think we have that problem. I mean, there is a drainage ditch.

MR. TOLMAS:

So really the OTB, simulcast, whatever is not holding up the financing. You have other elements involved with the land, with the title that keeps you from getting the thing done.

MR. MARTIN:

That is not correct. The title problems have -- and we have prudently not purchased the property until all these problems are resolved.

MR. TOLMAS:

I don't blame you one bit. I wouldn't take title of something that had defective title, cause then you in serious trouble.

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MR. MARTIN:

Yes, sir. And we have acted prudently as anybody would, but we are resolving the problems one by one as they come up.

MR. TOLMAS:

So in effect you are saying you still have title problems?

MR. MARTIN:

I don't know -- now you are really asking two attorneys to really start arguing whether the phase one of the environmental survey is a title problem. It is still open to litigation but it does control a title that is suggestive of litigation perhaps. It doesn't -- it doesn't affect the ownership of the property, but it does affect the willingness of a bank or anybody else to lend money on it, so it is a --

MR. TOLMAS:

Therefore, you couldn't go forward with the project of building the racetrack, or even a truck stop?

MR. MARTIN:

At this moment?

MR. TOLMAS:

Yes.

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MR. MARTIN:

We are not prepared to close at this moment because we haven't --

MR. TOLMAS:

I am talking about the title aspect of it?

MR. MARTIN:

All of the title releases, everything done. All that is left to do is the phase one environmental survey.

MS. TUCKER:

Item No. 6: The 1992 and the 1993 income tax returns for Livingston Down Racing Association and the 1992-93 returns for Al J. Ransome.

MR. MARTIN:

I belive the 1992 -- oh, yes, we do have the 19 -- what we did you will find when you look at it, that it was formed in 1992, I believe, October of 1992, but it really had substantial activity or experiences. What you will find is the 1993, you have long year income tax return in there that drops back and picks up December, November, and October, I believe of 1992, so those have been provided.

MR. TOLMAS:

Would that be on a fiscal year

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basis?

MR. MARTIN:

No, sir, on a calendar-year basis, but you can with this type of corporation file a long-year return, cause we only came into existenced October of '92, so we filed, instead of 12-month return, I believe it was 15, maybe 16 months, but that is covered in the income tax return that we furnished to you.

MR. TOLMAS:

Okay.

MS. TUCKER:

92-93 income tax returns for Al J. Ransome.

MR. MARTIN:

We have declined to produce the personal income tax returns for Mr. Ransome.

MS. TUCKER:

Item No. 7: Documentation of satisfaction of referendum expense in Livingston Parish.

MR. MARTIN:

That has been provided in the package. Also, in addition to that, I think some of the commissioners may have received the letter from the

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police jury perhaps yesterday, and I also have a copy of it here, which they have not desired, they view--again, see, I don't know what you are talking about on this item. We have given you the finance campaign report filed by Livingston

Downs which shows the expenses that they incurred and the expenses that they paid. I have heard some indication that what the commission is interested in, is there was some talk that Mr. Ransome had promised to defray the cost of the election on January 16. If that is the item that the commission is interested in, I have a letter from the police jury that says they first have not determined whether--what portion of it--cause there was another item on the election, on the ballot at that time, said they have not allocated a portion of the expenses of that election to Livingston Downs nor have they made any kind of demand or request on Livingston Downs or Al Ransome to pay it. The police jury does consider that to be--I think their letter states, more obligation of Al Ransome, Livingston Downs.

MS. TUCKER:

Item No. 8--I am sorry.

MR. MARTIN:

We haven't even looked into this yet, but it may not be legal for a citizen to pay a

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police jury expenses for an election. That is one thing, I believe their parish attorney is looking into as to whether even if we wanted to, could we legally do that. Not too many people go around just giving governments money.

MS. TUCKER:

Item No. 8: True copies of any civil judgments against Livingston Downs Racing Association. Obviously we have the judgment from Judge Keogh.

MR. MARTIN:

Again, if the commission was referring to that one, then you have it. I believe we provided that in the package. If the commission is asking whether Livingston Downs has been sued by somebody without paying its bills and somebody has gotten a judgment against them, no, ma'am, they have not. There are no other outstanding civil judgments against Livingston Downs, other than the one that

was referred to issued by Judge Keogh which we have lost at this point our declaratory judgment.

MS TUCKER:

Correct. Mr. Martin, I do have a petition for Rule to Show Cause filed by the State of Louisiana through the Board of Ethics under docket No.

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9407 in the 19th Judicial District Court concerning Livingston Downs failure to file financial disclosure statements with the Board of Elections with respect to that January 1993 referendum. Can you--

MR. MARTIN:

Yes I can. Livingston Downs, that charge was brought by the ethics commission against Livingston Downs for failure to file campaign finance report. The campaign finance report issued in that matter is included in the package and details expenses that Livingston Downs had during the campaign for referendum election. Mr. Ransome, Livingston Downs--and I was not that closely involved in anything, we had never--Mr. Ransome had never been involved with an election on that basis before. He of course supported and voted against certain political candidates over the years. He has never had an election in which he had a direct interest like that before. For two years running, the Livingston Downs story has been in the newspaper and the Denham Springs newspaper and another newspaper has been voted No. 1 news story for two years running in Livingston Parish. Mr. Ransome ran quite a few ads. They were all set forth at the bottom "Paid for by Livingston Downs, Al Ransome." Al Ransome made every shopping center in Livingston Parish

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and lobbied and politicked for his racetrack. Everybody knew that it was Al Ransome and Livingston Downs that were trying to put in the racetrack in Livingston Parish. Mr. Ransome was not aware of the election code that said you had to file campaign finance reports. A few weeks after the election, the election commission called and said, where are

your campaign finance reports. Mr. Ransome said I didn't know you had to file one. Yes, you do. Within a couple of days, we put together a campaign finance report and filed it. It was in fact filed late after the statutory deadline. The ethics commission and I had agreed on a consent on findings of fact which stated that there was no intent to deceive anybody, that everyone in Livingston Parish that voted on this knew exactly who was in favor of Livingston Downs and the horse racing proposition, although I can tell you right now, they certainly didn't know who was opposed to it, not going by the ads that ran out there. And there was a disagreement between Mr. Ransome and the ethics commission on the amount of the fine. Mr. Ransome had agreed to have pay $700 and they wanted $1400 and there you are. They don't agree on the fine, so they took it to court, and the judge will decide what fine, if any, will be imposed on Mr. Ransome.

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MS. TUCKER:

When is that scheduled for hearing, Mr. Martin?

MR. MARTIN:

I don't even know if it's scheduled. It's not scheduled.

MS. TUCKER:

It's not scheduled for May the 18th?

MR. MARTIN:

It's been continued for May the 18th. Are the copies ready yet, do you know?

MR. MARTIN:

I don't know.

MR. TOLMAS:

We are still waiting for them.

MS. TUCKER:

Do you want to take a five-minute recess?

MR. TOLMAS:

Recess for 10 minutes.

(A recess was taken.)

MR. TOLMAS:

The meeting will come to order. The chair recognizes Ms. Tucker.

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MS. TUCKER:

Mr. Martin has provided the commission with copies of the return.

MR. MARTIN:

I will be right back. I am going to ask one question.

MR. TOLMAS:

Ms. Tucker.

MS. TUCKER:

Mr. Chairman, Mr. Martin has provided the commission with copies of the current financial statement of Livingston Downs, the 1993 income tax returns for Livingston Downs, a true copy of the Curative Option to purchase the property in question, the documentation of the current status of any title, defects on the land, and that was also submitted by a presentation by Mr. Martin, the documentation of the current status of any title defects of where the proposed racing facility is supposed to be built. That was also supplemented by presentation by Mr. Martin. Documentation of satisfaction of the referendum expenses in Livingston Parish, and a copy of the civil judgment against Livingston Downs, that being the judgment rendered by Judge Keogh in the 19th Judicial District Court. Those

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are provided to each commission member for their review, and I will turn it over to any commission members who may have any questions of Mr. Martin with respect to any of these items.

MR. MARTIN:

I would like to supplement that presentation with an April 28th, 1994 letter from Mr. Joseph LeBeau representing the Heck family regarding--again, please understand, we have been--tried to be conservative and cautious as we possibly could. We think we are operating under the terms

of the original option of the purchase that was signed in October or November of 1992. In an abundance of caution, as we lawyers tend to do things, we have attempted to give written extensions to provide for every contingency that could come up, just to make sure that our rights to purchase the property are unquestioned.

As I told you earlier, we are getting yet another extension of the option to provide for the phase one environmental survey and the potential request for a phase two environmental survey, if there is any question on the phase one. So I would like to supplement that return on the Subpoena Duces Tecum with this letter.

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MS. TUCKER:

Thank you, Mr. Martin.

MR. TOLMAS:

Mr. Martin, one option, you have it renewed from December the 1st, '93 until a partial release is obtained from the FDIC of a judgment, so this is really a condition precedent in the action?

MR. MARTIN:

The releases on the mortgages have been obtained.

MR. TOLMAS:

You do have all these releases?

MR. MARTIN:

Yes, sir. As I pointed out earlier, the only thing that prevents us from closing in the next few days, as soon as all the attorneys can get together and get papers drawn up, is the phase one environmental survey. Mr. Alvin Fairburn, I believe you have the letter from Mr. Fairburn in there.

MR. TOLMAS:

Do you have a copy of those releases from the FBI?

MR. MARTIN:

I do not have them on me but I would be happy to supply these to the commission. Let

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me make a note.
MR. TOLMAS:
Would you?
MR. MARTIN:
Let me make a note. This option is a condition precedent that may never fulfill until they file releases. It remains open with no closing date possible. Mr. Tolmas, the title curative work is a file that contains about two hundred pages, so what I propose to submit to the commission is that the title company reserve the right to appove the releases, and we have a commitment letter or we can obtain a commitment letter from the title company that says they have approved the releases, so to save the commission from going through two hundred pages of title abstract work, which does involve some of the Heck's personal finances--
MR. TOLMAS:
No, I was asking for release from the FDIC. That is not two hundred pages. Ms. Ransome, would you want to testify?
MR. MARTIN:
No. What the situation is, what the RTC required of the Heck family, and this points out why we don't want to put all of this stuff in public

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record. It involves the Heck family finances that are just selling a piece of property. They had to substitute collateral to the RTC. There is a lengthy memorandum of understanding between the RTC and the Heck family as to net worth, values of property that are being substituted for collateral. So the RTC cannot just walk away from a piece of property. If any of you have dealt with the RTC, you know how they are to deal with. The Heck family is giving the RTC substitute collateral. Substitute deal. So the document, the memorandum from the RTC is lengthy and involves personal information on the Heck family that the RTC has.
MR. TOLMAS:

We don't need that information, just a point that says this judgment is released as far as this portion of ground.

MR. MARTIN:

Now, that is going to be a probably one, at most, a two-page document, but I can guarantee you, we ain't getting that until you sit down at the closing table. The RTC is holding it in its hands. We can give you a copy of it but it isn't executed--excuse me, it is. The one-page document is recorded. The collateral has been substituted.

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MR. TOLMAS:

I appreciate that.

MR. MARTIN:

What I am asking is that, I don't really want to put the Heck's financial business--

MR. TOLMAS:

We are not looking at that today at all. We are not concerned. Just the--

MR. MARTIN:

Okay.

MR. TOLMAS:

The option states the beginning date but no closing date.

MR. MARTIN:

Absolutely. We did that cause we don't know and we negotiated.

MR. TOLMAS:

But you said it's all done, a done deal as far as a requirement of the option?

MR. MARTIN:

Correct. It was simply not a matter of the RTC giving a release of the mortgage. There was a lengthy negotiation between the RTC and the Heck family regarding substitution collateral. So that has been done.

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MR. TOLMAS:

You say a release has been obtained?

MR. MARTIN:

Yes, sir.

MR. TOLMAS:

So we will have it documented in our record to show that the option is now viable and can be followed?

MR. MARTIN:

Yes, sir. If we are back in 30 days, we may have a phase one environmental survey to submit.

MR. TOLMAS:

Phase one or phase two?

MR. MARTIN:

Phase one. You do the phase one and depending how it comes out; we are optimistic.

MR. TOLMAS:

You don't even have a phase one?

MR. MARTIN:

No sir. There was litigation. It is being done--as you see the letter from Mr. Fairburn. The phase one environmental survey is being done. We are optimistic because there was prior

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litigation between the Heck family and the SECO facility. In that litigation there was determined it was determined there was no leakage, ground water seepage contaminating this parcel that we are attempting to purchase. We are very optimistic that phase one environmental survey will be a clean bill of health on the property and we will be able to go to closing.

MR. TOLMAS:

Actually you don't have a clean bill of health as far as the phase one environmental?

MR. MARTIN:

No, sir, we don't at this point.

MR. TOLMAS:

This financial statement of Livingston Downs is as of December the 31st, 1993. Do you have a more current

financial statement? This is--this is beginning of May. That is five months into 1994, so this statement is five months old.
MR. MARTIN:

I am assuming that we provided the most current one that we had. If you desire one effective, we can probably generate one as of April 30th, 1994 within the next two weeks.
MR. TOLMAS:

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This is what we were really looking for, a current financial statement.
MR. MARTIN:

I don't think you will see any significant change.
MR. TOLMAS:

Everything on this statement is true and correct?
MR. MARTIN:

I think there is a cover letter from Mr. Gene Ransome
MR. TOLMAS:

Who is Mr. Gene Ransome?
MR. MARTIN:

He is a certified public accountant and he is Mr. Ransome's brother. Mr. Gene Ransome is the controller for Unemployment Compensation Control Systems, Inc. and does financial statements for a family of companies starting with Unemployment Compensation Control Systems.
MR. TOLMAS:

He is a CPA?
MR. MARTIN:

Yes, sir.
MR. TOLMAS:

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I noticed one of the items on the balance sheet--deposits with racing commission, $10,000. That is not correct any more, is it, Mr. Martin?
MR. MARTIN:

I can't tell you for sure how much. I know Mr. Ransome has put up the required deposit for his race dates.

MR. TOLMAS:

Five thousand was forfeited by Mr. Ransome.

MR. RANSOME:

It was true on December 31st.

MR. TOLMAS:

Mr. Ransome, you want to come up and testify, sir?

MR. MARTIN:

If there is a question that I can't answer. I don't know--I am not a CPA.

MR. TOLMAS:

Mr. Ransome is here. If you can't answer it, let Mr. Ransome come up.

MR. MARTIN:

I can tell you right now, Mr. Ransome is not going to be able to tell you under

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general accounting principles how you treat that $5,000, whether it is a up on deposit or whether it's been forfeited, so Mr. Gene Ransome may be able to answer that question for you, but I guarantee you--

MR. TOLMAS:

You made the statement everything is unchanged from this statement.

MR. MARTIN:

No significant changes.

MR. TOLMAS:

$5,000 is insignificant?

MR. MARTIN:

Mr. Tolmas--

MR. TOLMAS:

Let me just ask you this. Is your client willing to testify before this commission today?

MR. MARTIN:

I don't know whether I am willing to have Mr. Ransome come up and testify.

MR. TOLMAS:

Let's make a determination. Will your client testify before this commission today? Now?

MR. MARTIN:

I request about a five-minute recess to make that determination, because I am not

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sure I am willing to have him take the stand at this point. If you and I--I apologize. $5,000 is significant.

MR. TOLMAS:

I don't want to argue about the five thousand.

MR. MARTIN:

I don't know whether he is going to change the classification of it.

MR. TOLMAS:

There may be other questions that the commissioners would like to pose to Mr. Ransome. Actually, he has been subpoenaed. If he is going to take the privilege, we would like the record to reflect that.

MR. MARTIN:

I would request about a five-minute recess to decide whether I am going to let him testify. Could I have that?

MR. TOLMAS:

Yes, sir. Recess five minutes.

(A recess was taken.)

MR. TOLMAS:

Will the commissioners please be seated?

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MR. MARTIN:

Yes, sir, Mr. Ransome will testify. But before he testifies, for the record, Mr. Ransome is testifying under protest subject to our objection to this hearing going forward. We specifically reserve our rights to section 961 of the Administrative Procedure Act, subsection C to protest and appeal any ruling made under this adjudicatory hearing because it is being conducted in violation of the law without proper notice being given and for the other reasons set forth in the exception.

MR. TOLMAS:

You have been sworn, Mr. Ransome?

MR. RANSOME:

I have. I am at your pleasure.

BY MR. TOLMAS:

Q. Mr. Ransome, we noticed the balance sheet that is submitted to the commission today is dated December the 31st, and it lists the assets and liabilities as of that date. Is that correct?

A. It is correct, sir.

Q. Do you have a more current financial available?

A. There is not a lot of activity in this account, and we just don't produce financial statement

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on a regular basis. I pretty much know what is going on. Probably 15, $20,000 difference in expenditures and it will not be a problem to produce that. This is the most recent one that--

Q. But you knew you were coming here to produce financial statement?

A. I gave you the most recent one, sir.

Q. You say everything on it is more or less?

A. As of that date, yes.

Q. How about now?

A. As of--

Q. Do you recall from memory any radical changes?

A. There will be an adjustment made on deposit of the racing commission that will change from an asset to an expense, a difference of $5,000. Probably another $10 to $15,000 in attorney fees and costs associated with what I have been--my continued efforts to develop this property.

Q. Do you have an item on this balance sheet of attorney fees?

A. Yes.

MR. PETER SMITH:

Yes, he has?

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A. Yes, one of the biggest ones. $78,179. It's not an expense, sir. You don't find that on a balance sheet. You find it in income and expense item.

Q. You said an item of $21.04 entertainment. You bought somebody a Coke?

A. Probably one of the commissioners.

Q. Which commissioner did you buy a Coke for?

MR. MARTIN:

I will instruct Mr. Ransome not to answer that one. Mr. Ransome, Mrs. Ransome and three or four other commissioners have already been drug through the coals at the ethics commission over a pot of coffee, so I think he bought me a Coke.

MR. RANSOME:

He admits to it.

MR. TOLMAS:

I have no further questions.

MR. COVINGTON:

Mr. Chairman.

MR. TOLMAS:

Mr. Payton.

BY MR. COVINGTON:

Q. Mr. Ransome, other than the materials that you have submitted with your--that were filed

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with the request for subpoena this morning, is there any other information that you can give us to show that you are in compliance with maintaining your license and, in particular, I am talking about financial material?

A. Well, I think if you look at this financial statement going right before you, is that I am making every effort humanly possible to develop this facility. Although I don't keep money in this account until it's needed. I don't think anyone can deny that I have spent in the last year--I

have put into this account $200,000. Now, if that is not good faith in pursuing this effort, I don't know what is. I know all of you gentlemen are capable of buying a Continental. Not many of you are capable of writing a check for it. But, if you wanted to buy one, you could by transferring it in from other sources that you control. That is how I am handling this company, and I am capable of continuing my effort and putting the funds that are necessary in this account while I am going forward with trying to develop this property.

Q. Mr. Ransome, we are not only concerned with your good faith effort to go forward with this, we are also concerned with your financial responsibility and being able to go forward. Now, the balance sheet

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using your figures shows about a $150,000 in the hole for Livingston Downs for--last year's income tax record for Livingston Downs shows a loss of about 140 or 150,000. We don't have your financial statement. We don't have your income tax returns, and all we have showing is those two things, $150,000 in the hole and $150,000 loss of income.

A. I don't think you will find too many startup businesses in this country that will show going in, they won, that they have to have a profit. They spend money toward the development of this, and you will find that you are in the hole for the first couple of years. It does show the capabilities, I put up $200,000 in one year. As far as my income tax return and my personal financial statement, I have delivered those to Mr. Martin. I think the state police or anybody will tell you that those certain items--once I give them to you, they become public record, and no application--river boat casino, any application requires that you breach the confidentiality of your income tax returns. And as Mr. Martin suggested, they would be happy to show them to a person who would be interested in this and could tell the commission or answer any questions that the commission may have about my financial statement or my income tax return

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maintaining confidentiality which I have a right to, according to law.

Q. We also have a right to, according to law, to delve into the finances of this matter?

A. Certainly, and I have no problem doing it without public record. Mr. Martin there will tell you that I have delivered them to him.

Q. Well, delivery to Mr. Martin doesn't do me any good cause I don't think what he has in his file--

A. I have a right to confidentiality that this will--it can't become a part of this public record.

Q. I don't think you have a right to confidentiality when you are asking to give a license and continue a license. I think you are under an obligation to furnish us with the information so we can make a reasonable decision.

A. I think I did that.

MR. COVINGTON:

I think you waived that.

MS. TUCKER:

Mr. Chairman, I have a question I wanted to ask.

MR. TOLMAS:

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Ms. Tucker.

BY MS. TUCKER:

Q. On January 10 of 1994, this year, the racing commission issued to you a letter which is a standard yearly request for financial reports that reads: Dear Mr. Ransome, please submit a copy of your audited financial reports and management letters for 1993. It states statutes. Do you recall receiving that letter?

A. Yes, I did. As I have had no operation--this is the only format that I have had. I think the format that was requested pertaining more to someone who is--the format as an ongoing racing entity, and this provides essentially the same information with the exception of operational. We have not been at that point where we do operate according to

the racing commission standards and their financial statement. This is what my CPA provided for me.

Q. That is not my understanding from our auditor, and it's expected that you provide an audited financial report and management letter for 1993, and the commission has never received a response to this letter.

A. This is the only thing I have available

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because we have not set up an accounting system that reflects operation of a racetrack because we have not yet begun operations as a racetrack.

MS TUCKER:

Thank you, Mr. Chairman.

BY MR. TOLMAS:

Q. Mr. Ransome, your largest creditor is UCCS, Incorporated. That is one of your corporations?

A. That is one I own 50 percent of.

Q. What is the status of that corporation?

A. That corporation has filed Chapter 11.

Q. Bankruptcy?

A. Right. No different from Evangeline Downs. It has specific reasons for it, but although it's not directly involved in racing. We have had--at the last meeting we had an approval of plan for reorganization which gives 100 percent payout. What was the name of the hearing?

MR. MARTIN:

I can, if I may for just a moment.

MR. TOLMAS:

We don't necessarily have to go into it.

MR. MARTIN:

I want to give a complete answer

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to your question. The status of UCCS is that it's in Chapter 11 reorganization. This month Judge Brainey in the Eastern District of Louisiana approved UCCS's disclosure statement. The disclosure statement is the first opportunity to present to the bankruptcy court the plan of reorganization. The plan of

reorganization calls for 100 percent payout of all unsecured creditors; the secured creditors; at this point I believe we have agreement from almost 100 percent of the creditors going into the confirmation hearing, so we were very confident that UCCS's plan of reorganization will be approved by the bankruptcy court. It is a 100 percent payout plan.

MR. TOLMAS:

Does that include the RTC creditors?

MR. RANSOME:

We have settled that. That was the whole purpose of going into Chapter 11 is to force settlement with RTC, and that has been done.

MR. TOLMAS:

Good for you.

MR. RANSOME:

The only way you can do--you know how the Gestapo works? And the only way we could get

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them was in a proper forum, we accomplished what we wanted to do.

MR. MARTIN:

The RTC has agreed--it's been pretty amazing. They have gone to claiming that they owned over half of the stock of UCCS to settling for an unsecured claim. The will be 100 percent paid out in the plan.

MR. TOLMAS:

Any further questions? (None) Thank you, Mr. Ransome.

MR. RANSOME:

You are most welcome, sir.

MS. TUCKER:

Mr. Chairman.

MR. TOLMAS:

Ms. Tucker.

MS. TUCKER:

That completes the agenda item two, which is the commission review of Livingston Downs' financial statement and conditions pursuant to 4:141, 147 and 159. Mr. Ransome has been given the opportunity to show compliance with the statutes, and we can move on to the third agenda item, which is the eligibility of Livingston Downs to retain

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its association license.

In conjunction with that item, Mr. Martin, a subpoena for Mr. Ransome's appearance and a Subpoena Duces Tecum was issued to Mr. Ransome for the same documents as in the previous agenda item, that being the current financial statement of Livingston Downs, the current financial statement of Al J. Ransome, the current financial statement of all officers and directors of Livingston Downs, a true copy of any options, documentation of the current status of any title defects; 1992, 1993 tax returns. Documentation of satisfaction of referendum, copies of civil judgments and --

MR. MARTIN:

We submitted our return on the subpoena for the second agenda item in response to the third agenda item along with--we supplemented it with a letter from Mr. LeBeau.

MS. TUCKER:

Correct. I am going to offer that into the record as Livingston Downs Exhibit No. 1.

MR. MARTIN:

That will be fine.

MR. STALL:

Mr. Martin, I forgot to ask

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Mr. Ransome when he was here, thinking of something else right now, but you answered, and I am sure he can answer it for himself. The financial--not your financing, the money that you need to build the racetrack, you still don't have that lined up; is that correct? Firm, I mean. Not with the

outcome of the OTB and everything else. You know what I am talking about.

MR. RANSOME:

I proposed in December oaf '92, a project that would have four different components. All four of these components were a plan that would make Livingston Downs a viable operation, because it would have something that no other racetrack has--four different profit centers. The most expensive of the profit centers was the construction of the racetrack. I admit that I did not have all of the details as to the profitability of the truck stop or the profitability of the show horse arena. The more research I got, it's incredible, and I have been called a fool so many times for even considering the racetrack. When I take the piece of property and develop it into a show horse arena and the truck stop, not depending on video poker, and make four million dollars a year on an investment of less than five

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million dollars. Okay?

I have put together a package that combines bank financing, leases on certain aspects of the truck stop. For instance, I am leasing the C store. Totally bankable deal, and as soon as the problems are finished--as soon as the environmental study is finished, then we are going to immediately close on acquiring the property and proceeding with the truck stop and the show horse arena. Now, there is something that has changed. Of course, video poker is the thing that attracts nontraditional investors. In fact, there will be a substantial cash contribution to the construction of this project by the video poker operation. Okay? When they took off the two-year moratorium and they took off the limits on video poker for the truck stop, the ball game changed. I didn't need the racetrack. I could go forward and buy this property, have two tremendously profitable centers, and the third one, the RV park that will have that, and make a significant profit on this. I have that put together. Okay?

The problem I face, a decision within my own self and the people that I am talking to as far as an investment is concerned, when it is public record that a racetrack cannot survive on live racing

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alone, it must have the ability, either under OTB or 149.2 of operating year round and generating additional income to supplement the live racing, and more so--moreover, to generate purses for horsemen. I could run this thing and break even but it wouldn't bother me. But the horsemen need something more than a thousand dollar purses, and what is driving purses in this state today is the ability to year round--when they are not running to generate purse money for their meet for the horsemen. That is the biggest concern that I have, because I know that I can't do it on 55 live racing dates.

MR. STALL:

Let me ask you this, Al.

MR. RANSOME:

I am trying to answer this. Let me give you the whole picture.

MR. TOLMAS:

Stick with the subject.

MR. RANSOME:

I think that is the subject.

MR. STALL:

Can you tell me what banks, what individuals, and how much money that you have raised to undergo for the racetrack? We don't have anything to do with it. The state police handle the truck stop. I

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just found that out this morning, and we don't have anything to do with RV or anything else.

MR. RANSOME:

I will say this, as soon as I sign any final agreement, which will be in the next week or two, because we are taking a different approach right now. We are not trying to raise the

money for the racetrack first. We are going to go ahead and get land done and then fight the battle because we will be having a thing. As soon as it is--I will tell you this, that the individuals that are putting up the majority of the money are licensed by the state police currently, and we have already said the First National Bank of Denham Springs is my prime bank that will, once I put the first four components in, will loan the balance of the money on the project.

MR. TOLMAS:

But as of this date, you don't have it?

MR. RANSOME:

I have an indication of interest from the bank that, if I do A B, C, D, they will fund loan.

MR. TOLMAS:

Back in May of 1993, last year, in

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this very hotel, you were asked a question, do you have financing? I have them standing in line, you answered.

MR. RANSOME:

Exactly.

MR. TOLMAS:

Standing in line as soon as possible--this is a quote from your testimony. I am going to build that racing surface within 30 days. I am starting on a truck stop to protect the land. Now, at page 160, Mobil is putting all the money up for that, i.e., the truck stop.

MR. RANSOME:

At that point in time, we exercised the option, and have not been able to close because of title problems.

MR. TOLMAS:

Here at another meeting, the May meeting, you answered on page 121: In 60 to 90 days I will be coming to you with the people who are going to participate in a track with me and that is a year ago.

MR. RANSOME:

That was said in good faith.

MR. TOLMAS:

The 60 days came and the 90 days came and went.

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MR. MARTIN:

At that point, you may recall that we had repeatedly requested certain items to be placed on the agenda, such as the right to either own and operate off-track betting parlors. We modified our application to limit that to the off-site betting parlor provided in 214 D. The racing commission simply wouldn't put those items on the agenda. When they finally put it on the agenda, we filed--and we couldn't get it on the agenda, we filed out in East Baton Rouge Parish for the Declaratory Judgment. You then put it on the agenda and deferred to Judge Keogh. We have been actively pursuing this. Everything that Mr. Ransome has told this commission has been told to them in good faith. When you deal with people and then they ask you the question, a month later, well, have you gotten anything from the racing commission? No, we haven't. They won't put us on the agenda. Well, they can't deal with you any more. They cannot deal with you.

We have gone through a process of trying to clarify our rights, and if the racing commission does what it apparently is headed for, it's doing day, then you will certainly have gone a long way toward clarifying our rights. We are not perhaps--I

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don't think we are going to enjoy the clarification that we have given the racing commission, but you will clarify rights. Each and every one of you folks are business people. You know good and well that you can't do business when you don't know the rules, when you don't know what you can do. Nobody can do business that way and nobody will do business for someone when you can't give them any kind of statement, yes, we do have this, no we don't have that.

MR. THOMAS:

Have you gotten a license for a racetrack?

MR. MARTIN:

Yes, sir, we do have a license for a racetrack.

MR. THOMAS:

That is what you all asked for and that is what we gave you.

MR. MARTIN:

We always said we forced that process.

MR. THOMAS:

Wait a minute. The point I am saying is that you all wanted a license. We gave you a license, but you keep coming back adding more and more

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to it, cause you can't do this without this, can't do that. That was not the first--what you all asked us for was license. Maybe you all had four steps or six steps in mind, but we agreed to the one you asked, and you received it.

MR. MARTIN:

Mr. Tolmas has been quoting from Mr. Ransome's testimony. I would ask him to go back to the December 10th from Mr. Ransome which explicitly outlined four steps.

MR. THOMAS:

Wait a minute. The point I am saying--we have nothing to do--the license is what we have jurisdiction over. We have granted that.

MR. MARTIN:

It's all in the license process is what we set forth.

MR. THOMAS:

All I am saying is--

MR. MARTIN:

If we had lost the referendum, you would never have seen us again. We won the referendum electon.

MR. THOMAS:

We had nothing to do with that.

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MR. MARTIN:

We came back for the license and racing dates.

MR. THOMAS:

Did you get that?

MR. MARTIN:

Yes. Then we said we could come back for dates.

MR. THOMAS:

Before you got license and you got dates, that was not your approach. You wanted the license. You were given the license, then you had to have racing dates immediately to start contstruction -- no OTB, no nothing. We gave you racing dates; is that right?

MR. MARTIN:

You did.

MR. TOLMAS:

Okay, sir. The point I am getting at, from that point there, we should have seen the racetrack being built. I mean, we don't have -- I don't have nothing to do -- I can't make somebody give you all the finance. We gave you the tools, all that we can give you at that time to require that or to obtain that. What you should have had before we gave

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them to you, but we did give them to you in good faith because Mr. Ransome had these proposals, and we took his testimony in good faith and issued him the license and the racing dates.

MR. MARTIN:

Yes, sir.

MR. THOMAS:

So, I don't know what else -- you are saying there is hard feelings between the commission and Mr. Ransome. I would love to see a track as well as anybody in that area. We want a racetrack. We don't want to have to back into it. We want the horsemen to be able to start running horses, not they to wait three years to back into a situation. That is my -- if you think we are fighting you about it or whatever, but it is my personal opinion, that what we have done and we expect you all to do what you said you were going to do.

MR. MARTIN:

Are there any further questions on agenda items No. 2 and 3?

MS. TUCKER:

We are on agenda item No. 3.

MR. MARTIN:

Mr. Covington.

MR. COVINGTON:

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I don't have any questions. Mr. Chairman.

MR. TOLMAS:

Mr. Covington.

MR. COVINGTON:

Is the floor open for a motion.

MR. MARTIN:

Before a motion is made or vote taken, Mr. Ransome has a brief closing statement to make regarding agenda item No. 3.

MR. RANSOME:

I appreciate what you just said, Mr. Thomas, that we all want the race track built. I am appalled as to the urgency of this hearing. In August, if I were to come back before this commission and request an additional set of racing dates, and I do not have the financing or anything, I would not ask for racing dates, nor this commission would not be required to -- in fact, you have an obligation not to give them to me. Right now we have in this state a void of so many racing dates. Nobody is interested in filling these racing dates. I am making every effort and expending a pretty considerable amount of money and time filling these racing dates. Who in this world is

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being harmed by Al Ransome continuing until August 15th to try to provide live racing for the horemen of this state? Who is being harmed? But, if you feel that I am not making the effort, and if you revoke this license today, then I cannot go to anyone and say, I have a license to build a racetrack, let's proceed with the financing. I will have that taken away, so any effort between now and August the 15th is futile because I do not have a license. On the other hand --

MR. TOLMAS:

Mr. Ransome, may I answer that to your satisfaction?

MR. RANSOME:

Yes, sir.

MR. TOLMAS:

I will go on record now that I will commit myself that, if you get financing and are in a position to carry out all the rules of this statute in obtaining license, I will go to bat for you and see that you get your license. This should be revoked today. In the meantime you put a black mark that racing commission doesn't want you to build a racetrack. I want to go on record, I want you to --

MR. RANSOME:

You are on the record.

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MR. TOLMAS:

I voted twice to give you a license, not once, twice. So did every member of this commission vote twice to give you a license, despite the fact that Civil Court in New Orleans declared the license vacate.

MR. RANSOME:

Show me one person who has been harmed by Al Ransome continue to fill dates that no one wants. Thank you for you attention, sir.

MR. TOLMAS:

The chair will entertain a motion.

MR. COVINGTON:

Mr. Chairman, in accordance with article 160, I cannot find any responsible financial information to indicate to me there is a continuing ability to meet a financial obligation in connection with the operations of a racetrack by Livingston Downs, so I make the motion that we revoke all licenses and permits granted to Livingston Downs as an association and that all license and permits to conduct race days be terminated and all racing privileges as well.

MR. TOLMAS:

Is there a second?

MR. STALL:

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Second.

MR. TOLMAS:

Second by Mr. Stall.

MR. MARTIN:

I want a poll on the commissioners.

MR. TOLMAS:

All in favor of the motion say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed?

MR. VINET:

Abstain.

MR. MARTIN:

I want a poll of the commissioners, please.

MR. TOLMAS:

Mr. Burgess, poll the commissioners.

BY MR. BURGESS:

Q. W. C. Littleton?
A. For.
Q. Mr. Stall?
A. For.
Q. Mr. Covington?

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A. For.
Q. Mr. D'Agostino?
A. For.
Q. Ms. Granger?
A. For.
Q. Peter Smith?
A. For.
Q. James Thomas?
A. For.
Q. Dale Vinet?
A. Abstained.
Q. Oscar Tolmas?

A. For.

MR. BURGESS:

Mr. Chairman, the motion carries eight-four, no one against, with one abstention.

MR. MARTIN:

Thank you, Mr. Chairman.

MR. THOMAS:

I don't know if what you stated about, if they get the necessary financial commitments and the necessary records, can we put that in the form of a motion that we will hear him and -- I guess what I am trying to get at, if he gets everything together, whether he gets it together next month or the next

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month, that we will immediately rule on it? I would say commit for, if he can get all this information.

MR. TOLMAS:

Mr. Thomas, make the motion.

MR. THOMAS:

Well, I don't know. I guess what I am trying to say is maybe Ms. Tucker can put it in a legal fashion. What I am trying to say is that --

MR. MARTIN:

If Livingston Downs returns to the racing commission with acceptable financial commitments for the financing construction of its project, then the racng commission would vote favorably on an application? I don't mean to be putting words in your mouth, but that is what I would like to hear.

MR. THOMAS:

I think if you fulfill all of the necessary requirements.

MS. TUCKER:

I think the problem maybe with voting on that right now is that we really need to review -- we need to go back and start from square one and we need to review exactly what kind of financial situation -- cause we don't even know what the necessary -- definition of necessary financial

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requirements is at this time. We need to probably -- we need to see what kind of submission Livingston Downs can make with respect to their financial responsibility to this industry. I think the sympathy is there for --

MR. TOLMAS:

As a practical matter, Mr. Ransome, Joe Blow or Jim Smith, anybody are welcome to come before this commission and apply for a license if they have the proper requirements as required by the statutes. If Mr. Ransome wants, he can get those. We gave it to him before, we are more than willing to give it to him again. I don't think we can vote today that it's acceptable for something we haven't seen. He is welcome by law to come before us.

MR. MARTIN:

Mr. Thomas was requesting that.

MR. THOMAS:

I withdraw my motion then. It's in good faith.

MR. TOLMAS:

Let it be understood, there is no doors closed to Mr. Ransome or anyone to apply for a license to run a racetrack before this commission. We welcome as many as possible, because it's good for the industry, and that is what we are here for is to make

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sure that the industry prospers as well as it can to goin through all kinds of hardships now.

MR. PETER SMITH:

Mr. Chairman.

MR. TOLMAS:

Mr. Smith.

MR. PETER SMITH:

My concern would be, if Mr. Ransome comes back in a month or so, say two months, certainly I agree that we would hear. I am wondering, since this man has spent some money in getting a referendum, would we give any preference between -- I think there should be a certain amount of time set here today to hear him before we would

consider any other license for any other party in Livingston Parish, if I am making myself clear?
MR. MARTIN:

In other words, Livingston Downs has gone through the time and trouble and a couple of hundred thousand dollars worth to get a referendum passed in Livingston Parish, now any of these gentlemen who operated in 86-87 can move into Livingston Parish and open our racetrack.
MR. PETER SMITH:

If you meet the requirements of

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your racetrack.
MR. MARTIN:

The one Livingston Downs fought for, the one that Livingston Downs campaign for, the one that Livingston Downs spent the money for and got the approval of 54 percent in a larger turnout than the last presidential election in Livingston Parish. Mr. Smith, I understand what you are saying, and I truly do appreciate your sympathy and your desires to see what something right, yes, sir, I do. I do.
MR. PETER SMITH:

If you can come up with the answers to the questions, then --
MR. MARTIN:

Absolutely. I more than appreciate it, and I can guarantee that Mr. Ransome appreciates your concern that the commission would not accept another application, somebody to open a racetrack.
MR. PETER SMITH:

We have a time limit on it. We couldn't say indefinitely because then people in Livingston Parish and the people out there would be suffering.
MR. MARTIN:

Yes, sir, I agree. I agree but the fact

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remains that Mr. Al Ransome scouted out what happens to be a rather unique location for a racetrack, and it's sitting out

there, and the action of this committee today has opened it up to fair game for anyone that wants to pick up.

MS. TUCKER:

Mr. Martin, may I say something just on behalf of the commission.

MR. MARTIN:

Sure can.

MS. TUCKER:

I think it's abundantly apparent that the horsemen want to have more racing days, but also abundantly apparent that this industry is in a serious state of distress right now. Obviously, based upon the difficulty that Mr. Ransome has getting qualified financiers to finance the project, that is true. It's also true that, there was, has been well over 15 months worth of discussion between you and me and Mr. Ransome concerning the off-track betting situation, that it was my advise at the very outset of this, and I came to your office and met with you, and told you that I thought that that was going to be a problem, and that I thought it would behoove Livingston Downs to get a Declaratory Judgment before they started

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on any of this action. So, against my advise, you all proceeded, and now courts -- you have spent the money, and the courts have ruled against you. I realize that it's a distressing situation that you are in, but it is certainly not one that was not foreseen.

MR. MARTIN:

And it's extremely distressing for the horsemen of this state, because what Livingston Downs can't do, no other Racing Association can do. I hope everybody on this commission realizes that the situation as it stands right now is that there will never be another new racetrack in the State of Louisiana, because as it stands right now, every racing association that went to the legislature in 1986 says that we can't survive without additional revenue from off-track wagering to build our purses to get folks coming into this

state. As it stands right now, there will never be. You and I had this discussion. If they all shut down tomorrow for one day, you could not open another one. You do not open.
MS. TUCKER:

And that was the exact intent of the law. That is the job of the legislature, to define and suppress gambling. What Judge Keogh said was that this particular offtrack betting statute is in

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compliance with the latest expression by the Louisiana Supreme Court, which allows for limitations on gambling, and this is a limitation, and we had discussed this before, and this is a limitation, and we had discussed this before, and I had advised you at that time that I thought proper -- excuse me. Let me finish. The proper avenue was for you to go to the legislature and change that because, since 1985 or '86 when the OTB statute was passed, circumstances in the State changed, and you chose not to do that.
MR. MARTIN:

We did do that and met with no success.
MS. TUCKER:

You chose not to do that first.
MR. MARTIN:

What I am telling the racing commission is that you -- everybody on the commission knows what your charge is regarding the horse racing industry to promote and maximize participation in the horse racing and the breeding is not just racetracks. It's the horsemen that own land, that stable horses, that race them and buy them and sell them, all industry.
MR. TOLMAS:

We could deal with this all day

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long, Mr. Martin. Livingston Downs is not the whole agenda for this meeting.
MR. MARTIN:

One minute, please, Mr. Tolmas. We would request that the racing commission offer, give us some assistance with the legislature to go and get this changed, because the HBPA has considered discussions. Do we want to open a racetrack? If they open a racetrack, they have the same problem, they can't do it. So, all I am saying is, as the law stands right now, according to Ms. Tucker and according to the courts, and we are still trying to get that changed, is there is no more new racing in the State of Louisiana. That was not the intent of the horse racing law. It says, to promote and maximize this industry.

We are in a situation now, not just Livingston Downs. This commission is in a situation where it's hamstrung and you can't develop this industry. The industry is static as it is now, and it's just not static. Static indicates it's not shrinking. It's obvious now with Jefferson Downs closure, with Evangeline Downs in bankruptcy, that you have a shrinking industry. You have new blood coming in. You have what appears to be at this point an absolute prohibition to anybody trying to do it. I

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think that is a regrettable situation, and I think everybody -- man and woman on this commission should employ the legislature to do something about that.

MR. TOLMAS:

We are not permitted to do that, Mr. Martin. We signed a pledge not to lobby the legislature under penalty of the law.

MR. MARTIN:

Okay. Then it's a shame.

MR. TOLMAS:

Okay. Let's move on now.

MS. TUCKER:

Mr. Chairman, may I prefect the record.

MR. MARTIN:

As a former licensee with the racing commission and with a stake in this matter, we request a ruling on the fourth agenda item.

MS. TUCKER:

If you will let me finish, I will get to that. With respect to the last agenda item, the third agenda item under Livingston Downs, I would like to offer into the record as Livingston Downs in globo the return on the Subpoena Duces Tecum that was issued and that Mr. Martin provided, and also as the following

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items: Livingston Downs revocation numbers one through eight which are the December 10th, 1992 transcript of the Louisiana State Racing Commission meeting; the January 21st transcript; the April 15th 1993 transcript. The May 27th, 1993 transcript; the August 26th, 1993 transcript; the December 3rd, 1993 transcript; and the January 27th, 1993 transcript. The March 29th, 1993 transcript, and in addition as Livingston Downs revocation No. 9, the January 10th, 1994 letter to Mr. Ransome requesting a copy of his audited financial and management letters for 1993.

That completes that agenda item.

MR. MARTIN:

Was there a ruling on the agenda item?

MS. TUCKER:

It was accepted in the record.

MR. TOLMAS:

Let it be accepted in the record.

MR. MARTIN:

The ruling is?

MS. TUCKER:

That items that I just put into the record have just been placed into the record.

MR. MARTIN:

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Okay. Can we have a clarification on whether, if Livingston Downs is licensed, they have those rights?

MS. TUCKER:

What rights?

MR. MARTIN:

I will request a ruling on the agenda item, Ms. Tucker.

MS. TUCKER:

And I would suggest, Mr. Martin, if you would like an attorney general's opinion, that you get in touch with Mr. Tolmas who is the chairman of the racing commission and ask him to make a formal written request of the Attorney General's Office for an opinion as to whether or not a new racing facility built subsequent to the passage of the off-track betting act may operate at its facility simulcast year round. That is, as I understand it, the question?

MR. MARTIN:

In other words, you will not rule, the racing commission will not rule on our fourth agenda item?

MS. TUCKER:

No.

MR. TOLMAS:

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Don't you think it's premature, Mr. Martin?

MR. MARTIN:

No, sir. As a matter courtesy, I would like to inform the racing commission that, under section 158: Upon revocation, suspension, withdrawal of a racing license or racing privileges of an association, that the association is entitled to go to the parish court over which it has jurisdiction of it, which is Livingston Parish; and at 11:47 this morning, a Petition for Review and Trial Novo of this matter was filed and a suspensive appeal was granted enforcing, keeping in force Livingston Downs' license. As you can tell, we fully expected the vote that happened today.

MR. TOLMAS:

Oh , you filed this before the vote?

MR. MARTIN:

No, we filed it immediately after the vote.

MS. TUCKER:

Do you have a copy of the Petition for Judicial Review?

MR. MARTIN:

I will -- I don't mean to be ugly, but you misapplied orders to the commission before and

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you flatly ignored court orders, so I will supply it for you, and I will get it for you. If you want it, I will have it faxed up with the judge's signature on it. Livingston Downs license is in effect, as we speak, and will remain in effect until further order of the court in Livingston Parish.

MR. RANSOME:

May I thank the commissioners for listening to me, and I want to state publicly to the horsemen, that although I am called a fool for even doing it, I will not give up, I will continue to do everything within my power to provide live racing days to thoroughbred and quarter horsemen in this state.

MR. TOLMAS:

Thank you, Mr. Ransome.

We have three rules. Tino, would you address the commission. Come by the mike and inform the commission of what these rules -- refresh their mind what stage the rules have been in.

MR. RIEGER:

These three rules are in -- they are ready to be formally adopted. They have gone through the procedures. They have been posted in the Louisiana Registrar, and they are now awaiting approval from the commission. The three rules are: The two-

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year-olds medication rule 1503 which has been repealed in its entirety. That was a rule that said two-year-olds could not have bute. Rule 1722 was also repealed in its entirety, and paving the way for two-year-olds to be allowed to run on bute. We have now been under

emergency rule and it went through the proper channels. It's cleared the Louisiana Registrar. It's now ready for a vote. Also, the equipment rule 9503 which is a safety rule. All jockeys from this point on will be required by rules to wear their safety vests.

MR. VINET:

I so move, Mr. Chairman.

MR. PETER SMITH:

I second.

MR. TOLMAS:

Any discussion? Mr. Gelpi, do you want to address these rules?

MR. GELPI:

I wanted to get a copy of them first, and I may ask a question.

MR. TOLMAS:

All right, sir.

MR. GELPI:

Just for clarity, the rule related

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to the two-year-olds is that your making a permanent rule of the emergency rule? This is -- let me stop there. The rule related to the two-year-olds, the action you are taking today is to make permanent your emergency rule?

MR. TOLMAS:

All three of them are the same.

MR. GELPI:

All right.

MR. RIEGER:

They have gone through the proper channels and now they are ready for --

MR. TOLMAS:

The chair will entertain a motion.

MS. GRANGER:

It's made.

MR. VINET:

I moved.

MR. PETER SMITH:

Second.

MR TOLMAS.

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

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Opposed? (None) Motion is adopted.

MS. TUCKER:

The Richard King matter. Mr. Gelpi represents Mr. King, and it has been continued. Shelton Zenon.

MR. TOLMAS:

Mr. Gelpi, are you the attorney in this case?

MR. GELPI:

No, sir, I am not. I understand I am shown as attorney in this case, but I have not been asked to represent this licensee.

MR. TOLMAS:

Ms. Tucker.

SHELTON ZENON:

after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. TUCKER:

Q. Mr. Zenon, you are appearing before the commission today after having a positive drug test in one of your horses; is that correct?

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A. Yes, ma'am.

Q. You are unrepresented by counsel? You don't have a lawyer?

A. No, ma'am.

Q. Do you want a lawyer with your hearing today?

A. (The witness shakes negatively.)

Q. You don't have a lawyer?

A. No.

Q. You can stand at the podium or you can sit.

A. Better I sit. I have a bad knee.

MS. TUCKER:

Mr. Zenon appears before the commission today. His horse American Woman, who was the winner of the sixth race at Delta Downs on March the 12th of 1994, tested positive for Hydromorphone and the metabolite Dihydromorphine. He had a hearing before the stewards on March the 26th, was suspended six months and referred. The State calls Judy Dugas.

Mr. Zenon, I am calling Ms. Dugas because she is the state steward at Delta Downs.

Q. I am sure you know her, correct?

A. Yes, ma'am.

Q. You had a hearing with Ms. Dugas?

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A. Yes, ma'am

Q. Are you disputing before the commission any of the findings of Ms. Dugas?

A. I understand.

Q. In other words, do you disagree with the finding that Ms. --

A. Yes, I disagree.

JUDY L. DUGAS

after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. TUCKER:

Q. Ms. Dugas, did you have occasion to have a stewards hearing where Mr. Shelton Zenon?

A. Yes, we did.

Q. What was the substance of that hearing?

A. Mr. Zenon denied giving any medication to his horse. He did not request a split sample. He had no idea how the substance came to be in his horse, and he did not request a suspensive appeal.

Q. Is he currently on or off-track?
A. He is off-track.
Q. And in conjunction with the hearing, did
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you issue a ruling?
A. Yes, we did.
Q. Was that ruling No. 4066 from Delta Downs?
A. Yes, it was.

MS. TUCKER:

Mr. Chairman, I offer into the record ruling No. 4066 as Zenon 1, and also as Zenon 2, special report by Ms. Judy Dugas, state steward for Delta Downs.

Q. Mr. Zenon, do you have any questions of Ms. Dugas?
A. No, ma'am.
Q. Do you want ask her any questions?
A. No, ma'am.

MR. VINET:

Mr. Chairman, I had a conversation with Mr. Zenon before the meeting, and he swears up and down that he doesn't even know what this is, and I know we hold him responsible for it. But it's his first offense that he has ever had, and I would like that we go a little bit lenient on him, give him a chance, give him the benefit of the doubt.

MR. TOLMAS:

That is category one drug. The
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recommended penalty guidelines as followed by the RCI in most states throughout the country, most commissions throughout the country --

MR. VINET:

Mr. Chairman, if we go according to what they are saying on here --

MR. TOLMAS:

We adopted that, Mr. Vinet.

MR. VINET:

I know.

MR. TOLMAS:

This commission went on record saying we would unify our penalty guidelines with the RCI.

MR VINET:

And that is what? I mean, if you put a $5,000 fine on this man here, you are putting him out of business.

MR. TOLMAS:

It's a one-year suspension, not more than five years.

MR. VINET:

I would like to make a motion that we suspend him for six months and give him a five hundred dollar fine.

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MR. LITTLETON:

I will second that.

MR. TOLMAS:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None)

MR. TOLMAS:

The motion is adopted.

MR. VINET:

You understand, Mr. Zenon, what we did for you right here? This violation calls for a one-year suspension or a $5,000 fine. That is what this violation calls for. We gave you six months suspension and a five hundred dollar fine cause I know you can't afford it. I am almost sure can't afford no $5,000?

MR. ZENON:

No, sir, I can't.

MR. VINET:

So we are giving you a chance, don't come back, you know.

MR. ZENON:

Yes, sir, I understand what you are

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saying.
MR. THOMAS:

Also, it's imperative that you understand the rules, that no shots -- that you can't give no shots and your horse has to be attended by you from the time you take him up there. The horse can't be left alone. Until you understand those --
MR. VINET:

You better stay with your horse when you get back on track -- you have been off track now. This is six months from the time you got off track. So you got a month and something served already. So, this is from the time you got off track till your six months are up. When you get back on track, make sure you stay with your horse, that nobody can get to your horse.
MR. ZENON:

I understand what you are saying. When do I need to pay this?
MR. VINET:

Any time during this six months. You can pay it on time if you want to, but as long as you have it paid for by the time your six months are up.
MR. ZENON:

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Who do I mail the money to or what?
MR. VINET:

To Judy Dugas or Louisisana State Racing Commission. You give it to Ms. Dugas.
MR. ZENON:

Okay.
MR. TOLMAS:

But you are not to be permitted on any racetrack or off-track betting parlor.
MR. ZENON:

I know that. I don't go to the tracks at all right now.
MR. PETER SMITH:

Do you understand instructions and the guidance the commission has given to you?

MR. ZENON:

Yes, sir.

MR. PETER SMITH:

You do you understand that no matter, if you don't know what happened to your horse, you are totally responsible for that horse?

MR. ZENON:

Yes, sir.

MR. PETER SMITH:

And I guess Judy Dugas can instruct

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you how to pay your fine.

MR. VINET:

I want you to know, this commission kind of feels for you all, and we are giving you a chance. We are not being very hard. This is very, very light. This going out on a limb trying to help you out, so don't let us down, please.

MR. BURGESS:

For the record, is the commission upholding the stewards' ruling?

MR. VINET:

Right. That is six months?

MS. DUGAS:

Six months effective 3-6-94.

MR. TOLMAS:

How much was the fine?

MS. DUGAS:

Five hundred.

MR. TOLMAS:

Okay, sir.

MS. TUCKER:

Joseph Calais. Mr. Chairman, I don't believe Mr. Calais is here. To refresh the commission's memory, Mr. Calais appeared before the commission in the end of January. It was a fourth drug

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offense, but because the first two drug offenses had not been -- there had not been a stewards' ruling issued on his first two drug offenses, the commission cut him slack and put him on probationary period. The first drug test that he took, meaning he came up positive for cocaine, I believe Mr. Calais was notified to be here. He received proper notification, and Ms. Dugas also spoke with Mr. Calais and told Mr. Calais to appear before the commission today and it would be in his best interest to do so. Ms. Dugas, am I stating that correctly, you spoke with Mr. Calais?

MS. DUGAS:

In stewards' hearing, he was informed that he would be on the agenda for this meeting.

MS. TUCKER:

Subsequent to the stewards' hearing, did you have any kind of conversation with him?

MS. DUGAS:

Yes. I told him that it would be in his best interest to appear before the racing commission, that he -- he hated to come before the racing commission and face them again because he was on -- it was only six months since the commission gave

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him a very life light penalty for his fourth offense and he hated to face the commission again.

MS. TUCKER:

Mr. Chairman, in light of the fact that Mr. Calais has been given notice by certified mail and also had conversation with the state steward, Ms. Judy Dugas, concerning his appearance here today, I would recommend that the commission go forward with hearing this matter.

MR. GREGOIRE:

I spoke to his employer, Louisiana Stallions, and she is attempting to get him in-house as of Wednesday I spoke to her. They are trying to get him in-house drug.

MR. TOLMAS:

He will have to come back before us.

MS. TUCKER:

In connection with Mr. Calais' case, I would offer as Calais Exhibit No. 1 in globo the entire racing commission records provided to the commissioners here today.

MR. TOLMAS:

Mr. Littleton.

MR. LITTLETON:

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I move we give him 15 years and uphold the stewards.

MS. GRANGER:

Second.

MR. TOLMAS:

All in favor of the motion say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is adopted.

MS. TUCKER:

Donald Watson.

DONALD WATSON,

after having been first duly sworn, was examined and testified as follows:

EXAMINATION

MS. TUCKER:

Mr. Chairman, Mr. Watson appears before the commission today for reinstatement. He was given a six-month suspension from October 23rd -- October the 23rd of 1993, excuse me, through April the 23rd of the 1994 drug abuse, for drug offense. He was

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required at the last commission meeting where he appeared to appear before the commission after the six months probationary period to explain to the commission what efforts he has towards his drug rehab, and that is why he is

appearing today to make that presentation to the commission and seek reinstatement.

Q. Is that correct, Mr. Watson?

A. Yes, ma'am.

Q. Have you been able to get yourself in a drug rehabilitation program?

A. Yes, ma'am.

Q. Where was that?

A. Brisco in Lake Charles.

Q. Was that an in-house rehabilitation program?

A. 28-day program in house.

Q. When did you go into the program?

A. December the 8th.

Q. And you got out I guess then sometime in January?

A. No, I went in on the third of March -- when was it? January.

BY MR. TOLMAS:

Q. Mr. Watson, when did you say you went in?

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A. I have it on paper. They had sent a copy of the --

Q. Yes, we have a copy here. It says you were admitted on March the 8th.

A. Right, then on April the 5th --

Q. You got out?

A. I got out, right.

MS. TUCKER:

Are you currently in any kind of 12-step program?

A. Yes, sir. I go to AA meetings and seek counseling at Brisco's

Q. How often do you go to AA meetings?

MS. DUGAS:

He also attends meetings at the track.

MR. VINET:

Mr. Gregoire, do you have something on him?

MR. TOLMAS:

Yes, he has a report on him.

BY MS. GRANGER:

Q. Where are you going?

A. South city group on LaSalle Street, Lake Charles.

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Q. How often?

A. I make three meetings a week.

BY MR. LITTLETON:

Q. Are you the one that worked for Lee Berwick?

A. Yes, sir.

MR. GREGOIRE:

I spoke to Dan Blake, a counselor who holds the meetings at Delta Downs. He said he is doing very well, has a very good attitude and he does make the meetings in Vinton.

MS. TUCKER:

He has served his six-month suspension.

MR. COVINGTON:

Mr. Chairman.

MR. TOLMAS:

Mr. Payton.

MR. COVINGTON:

Is the floor open for a motion on this?

MR. TOLMAS:

Yes, it is.

MR. COVINGTON:

I make a motion that he be

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reinstated and that this is subject to his attendance of after care at the track on Wednesdays for one year and continue with his drug screen test as outlined in this letter of April the 15th, 1994 by Dan Blake.

MR. VINET:

I second it.

MR. TOLMAS:

All in favor of the motion say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Opposed? (None) Motion is adopted. You understand?

MR. WATSON:

Yes, sir.

MR. TOLMAS:

You are reinstated. You can get your license, but you have to stay with Mr. Blake, follow his instructions.

MR. WATSON:

I will.

MR. TOLMAS:

Don't get in any trouble in the meantime.

MR. WATSON:

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Thank you.

MS. TUCKER:

That is all I have, Mr. Chairman.

MR. VINET:

I move that we adjourn.

MR. PETER SMITH:

Second.

MR. TOLMAS:

Before we adjourn, the chair, and I am sure the commission would like to thank Lieutenant Robinson for serving so well on behalf of the commission. He has been with us the whole period of time with this new commission and has done an excellent job and we sure hate to see him being transferred. We surely hope that it's a step forward for you and maybe come back and see us and things are improved down here where we are.

LT. ROBINSON:

Very good.

MR. TOLMAS:

Good luck to you and we wish you well. (Applause)

We will now vote on a motion to adjourn. All in favor of the motion say aye.

COMMISSION MEMBERS:

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Aye.

MR. TOLMAS:

Opposed? (None) Meeting is adjourned.

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CERTIFICATE

I, SYLVIA C. PASTRANO, a certified Court Reporter for the State of Louisiana, do hereby certify that the foregoing transcript is true and correct, as reported by me and reduced to Typewriting under my personal supervision.

/s/ Sylvia C. Pastrano

SYLVIA C. PASTRANO

In
CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NOS. 92-20961 c/w 95-15331 SECTION 11 DIVISION "G"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * * * * * * * * * * * * *

CONSENT JUDGMENT

This matter came before the Court on the consent of the parties.

Considering the law and the evidence, the stipulations and consent of the parties, and the arguments of their counsel, the court determining that this judgment should issue on the consent of the parties as evidenced by their signatures hereon,

1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the pendency of the Stay of these proceedings the ten year license issued to Livingston Downs Racing Association, Inc. on May 27, 1993 and licenses to conduct live race meetings previously issued to Livingston Downs Racing Association, Inc. by the Louisiana State Racing Commission are suspended, and the Commission shall not, except as hereinafter provided in this Consent Judgment, be required to consider the plaintiff as a licensed association. The parties acknowledge the finality of the judgment of the court of Appeal-Fourth Circuit in the proceedings Jefferson Downs v. State Racing Commission, #94-2235, 637 So2d 1279 (La. App. 4 Cir. 1994) regarding the permit issued to the plaintiff pursuant to La. R.S. 4:181 on December 10, 1992.

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any dates for which Livingston Downs Racing Association, Inc. may apply to conduct a live race

meeting shall be restricted as follows: (1) for thoroughbred racing: for the period after the traditional close of the Evangeline Downs live race meeting until the traditional opening of the Fair Grounds live race meeting, and (2) for quarterhorse racing: for the period of November through April. Provided however, nothing contained herein shall prevent the Commission from awarding to Livingston Downs Racing Association, Inc. other racing dates which may become available if such dates are requested by Livingston Downs Racing Association, Inc.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission,

upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

10. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall include simulcasting rights as conferred upon other licensed associations pursuant to La. R.S. 4:149.2, which rights may only be exercised by the licensee so long as it conducts live horse racing for not less than eighty racing days within a twenty consecutive week period at the facility designated in its license. The §149.2 simulcasting rights currently enjoyed by licensed associations under current rules, regulations, policies and practices of the Commission include year-round simulcasting of out-of-state races at the racing facilities of the licensees.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall not include simulcasting rights as conferred upon other licensed associations pursuant to La. R.S. 4:211 et seq., including but not limited to §214(D). However, this Consent

Judgment would not prohibit Livingston Downs Racing Association, Inc. from applying for licensing under §§211 et seq. in the event of a final decision of the Louisiana Supreme Court favorable to it in the matter on appeal to that court from the 19th Judicial District Court for the Parish of East Baton Rouge in proceedings numbered 399,563 entitled Livingston Downs Racing Association, Inc. v The State of Louisiana (Edwards), et al.

12. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within the delays indicated below from the date of the issuance of its ten year license by the Commission, Livingston Downs Racing Association, Inc. shall make substantial progress toward the completion of the following matters by the times set forth, and failure to make substantial progress by such times may constitute "just cause" for the suspension or withdrawal of the license by the Commission:

(a) sixty (60) days: submission of an up-to-date business plan to the Commission.

(b) eighteen (18) months: submission of final architectural and engineering plans for the racing facility, bid specifications, and building permits, and environmental and wetlands clearances to the Commission.

(c) two (2) years: awarding of the construction contract for the racing facility and filing construction contract with the Commission.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within four (4) years from the date of the issuance of its ten year license by the Commission, or by August 31, 2003, whichever is later, Livingston Downs Racing Association, Inc. shall file with the Commission (1) a true copy of the affidavit of substantial completion and

acceptance pf the property by the owner, (2) its first condition book as provided for in Rules of Racing 35:III.5729, and (3) its list of employees and officials as provided for in Rules of Racing 35:III.5701, and failure to do so by such time may constitute "just cause" for the suspension or withdrawal the license by the Commission.

14. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event of delays in construction, which are caused by labor strikes, material shortages, acts of God or of war, then the Court may grant reasonable extensions of the times established in the preceding numbers 12 and 13, if the parties have been unable to agree upon such extensions.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in

a trial de novo or otherwise apply to this Court for appropriate relief.

17. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall afford Livingston Downs Racing Association, Inc. on or about April 15th and on or about August 15th of 1997 and 1998 notice of any requests for racing dates which may conflict with those to be sought by Livingston Downs Racing Association, Inc. and shall consider any objections which plaintiff may have to the granting of such dates to any other association.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

JUDGMENT READ, RENDERED AND SIGNED this 15 day of November, 1996 at New Orleans, Louisiana.

(Sgd.) Robin M. Giarrusso
Judge

Consented to and submitted by:

FOR THE PLAINTIFF, LIVINGSTON DOWNS RACING ASSOCIATION, INC.

By: /s/ Al J. Ransome
Al J. Ransome, President

By: /s/ Darlene S. Ransome
Darlene S. Ransome, Esq.
LSBA # 21983
Counsel

By: /s/ Victor A. Sachse, III
Victor A. Sachse, III, Esq.
LSBA # 11645
Counsel

FOR THE DEFENDANT, LOUISIANA STATE RACING COMMISSION

By: /s/ Albert M. Stall
Albert M. Stall, Chairman

By: /s/ Paul A. Bonin
Paul A. Bonin
Assistant Attorney General
LSBA # 3211
Counsel

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RICHARD T. MARTIN
CLERK

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

CIVIL ACTION

VERSUS **NO. 96-3430-A-M1**

JEFFERSON DOWNS CORPORATION, FAIR GROUNDS CORPORATION, INC., FINISH LINE MANAGEMENT, INC., BRYAN KRANTZ, MARIE KRANTZ, KAREN J. THOMAS, TERRENCE LEE ODOM, COMMITTEE TO CONTROL GAMBLING, PETER HENRY, GEORGE BOUDREAUX, OSCAR J. TOLMAS, ALBERT STALL, PAYTON COVINGTON, MELINDA M. TUCKER, LARRY BANKSTON, JAMES BEN THOMAS AND W. C. LITTLETON

COMPLAINT FOR DAMAGES AND DEMAND FOR TRIAL BY JURY

Preliminary Statement

1.

This civil action is brought by plaintiff, Livingston Downs Racing Association, Inc. ("LDRA"), a Louisiana corporation, domiciled in Livingston Parish, with its principal place of business in Baton Rouge, Louisiana against

the defendants named herein. The relief sought includes tort damages based on traditional state law causes of action, violation of the Sherman Anti-Trust Laws and 42 U.S.C. 1983, 1985 and 1986. This action seeks treble damages pursuant to enumerated statutes, costs of investigation and suit, interest and attorney's fees under both federal and state law and divestiture of properties obtained through illegal acts in violation of the Sherman Anti-Trust Act.

Jurisdiction

2.

This Court has jurisdiction over this matter under Title 28, §1331, 15 U.S.C. §4, and 42 U.S.C. 1983, 1985 and 1986, in that there is a federal question arising under the laws of the United States.

Venue

3.

Personal jurisdiction and venue in this action are predicated on 18 U.S.C. 196 and on 28 U.S.C. 1391(b) since the defendants are either residents of, are found within, have agents within, have transacted business within, and certain activities of the defendants giving rise to this action took place both within and without the Middle District of Louisiana. These activities have been directed against and caused damages to LDRA whose domicile and business activities are located within the Middle District of Louisiana.

The Parties

4.

Plaintiff, LDRA, is a Louisiana corporation domiciled in the Parish of Livingston, Louisiana, with its temporary business office located in the Parish of East Baton Rouge.

5.

Made defendants herein are Jefferson Downs Corporation, Inc. ("Jefferson Downs"), a Louisiana corporation doing business in Kenner, Louisiana; Fair Grounds Corporation, Inc. ("Fair Grounds"), a Louisiana corporation doing business in New Orleans, Louisiana; Finish Line Management ("Finish Line"), a Louisiana

corporation, doing business in the Louisiana Parishes of Orleans, Jefferson, St. Charles, St. Tammany and Terrebonne; the Committee to Control Gambling, a Louisiana corporation doing business in Baton Rouge, Louisiana; Bryan Krantz, a major domiciliary residing in the Parish of Jefferson, Louisiana, who, on information and belief, at all relevant times was an officer, director and stockholder of the Fair Grounds, Jefferson Downs and Finish Line Management; Marie Krantz, a major domiciliary residing in the Parish of Jefferson, Louisiana, who, on information and belief, at all relevant times was an officer, director and stockholder of the Fair Grounds, Jefferson Downs and Finish Line Management; Karen Thomas, a major domiciliary residing in the Parish of Livingston, Louisiana, who, on information and belief, at all relevant times was an employee in the law offices of Larry Bankston; Terrence Lee Odom, a major domiciliary residing in the Parish of Livingston, Louisiana, who, on information and belief, at all relevant times was the spouse of Tina Odom, who was a long time employee of the law offices of Larry Bankston; Peter Henry, a major domiciliary residing in the Parish of Orleans, Louisiana, who, on information and belief, at all relevant times was an officer and director of the Committee to Control Gambling and an employee of Jefferson Downs; George Boudreaux, a major domiciliary residing in the Parish of Orleans, Louisiana, who, on information and belief, at all relevant times was an officer and director of the Committee to Control Gambling and an employee of Fair Grounds; Oscar Tolmas, a major domiciliary residing in the Parish of Orleans, Louisiana, who, on information and belief, at all relevant times was an appointed member of the Louisiana State Racing Commission ("LSRC") and served as its Chairman; Albert Stall, a major domiciliary residing in the Parish of Orleans, Louisiana, who, on information and belief, at all relevant times was an appointed member of the Louisiana State Racing Commission and served as its Second Vice

Chairman; Peyton Covington, a major domiciliary residing in the Parish of Calcasieu, Louisiana, who, on information and belief, at all relevant times was an appointed member of the Louisiana State Racing Commission; Melinda Tucker, a major domiciliary residing in the Parish of Orleans, Louisiana, who, on information and belief, was an appointed Assistant Attorney General assigned to duties as legal advisor to the Louisiana State Racing Commission; Larry Bankston, a major domiciliary residing in the Parish of East Baton Rouge, Louisiana, who, on information and belief, at all relevant times was a State Senator, Chairman of the committee with oversight over gambling and was lead counsel for Jefferson Downs, Fair Grounds, Finish Line Management, Committee to Control Gambling, Karen Thomas and Terrence Lee Odom in legal matters relating to LDRA; Ben Thomas, a major domiciliary residing in the Parish of Caddo, Louisiana, who, on information and belief, at all relevant times was an appointed member of the Louisiana State Racing Commission; and W.C. Littleton, a major domiciliary residing in the Parish of Ouachita, Louisiana, who, on information and belief, at all relevant times was an appointed member of the Louisiana State Racing Commission.

6.

The defendant members of the LSRC constitute a majority and controlling vote on all LSRC matters affecting LDRA.

The Scheme and Conspiracy

7.

The defendants named herein acted at times in conspiracy among themselves, and at times alone, unknown at the time to plaintiff, to devise, intend to devise and participate in a scheme to violate the Sherman Anti-Trust Act by creating a monopoly on live horse racing business and off-track wagering business in a defined market area; by acts in restraint of trade designed to prevent LDRA from entering into competition in the defined market area and acting under

color of state law to commit acts in furtherance of the scheme to monopolize and to violate the constitutional rights of LDRA and the citizens of Livingston Parish to a fair and impartial election; to deprive LDRA of property without due process of law; and to deny LDRA equal protection of the laws, all in violation of 42 U.S.C. 1983, 1985 and 1986. As a further result of this scheme, the people of Livingston Parish were denied jobs and revenue and the horsemen of Louisiana were deprived of jobs and millions of dollars in purse money generated by live horse racing and off-track wagering in the defined market area.

Background of the Scheme

8.

It is respectfully alleged that the relevant market for this case is the 100 mile radius from the Fair Grounds Race Track, pursuant to La.R.S. 4:147(1)(a), which prohibits race meetings with the same or overlapping dates within a 100-mile radius.

9.

The Louisiana statutory scheme to regulate the racing industry centers around La.R.S. 4:147(1)(a), which prohibits racing with the same or overlapping racing dates within a 100-mile radius of any race tracks. It provides in pertinent part:

> The Commission shall carry out the provisions of this part, including the following specific duties:
>
> (1) to set the dates during which any race meeting may be conducted in this state, including dates which limit racing on particular tracks for quarter horses only, provided that:
>
> (a) it shall prohibit the conducting of any thoroughbred race meetings having the same or overlapping dates for such race meetings at thoroughbred race tracks within a radius of 100 miles of each other; . . .

10.

Pursuant to La. R.S. 4:147(1)(a), Jefferson Downs and Fair Grounds both historically operated within a common 100-mile radius, operating respectively from April to November, and from November to March. Each was therefore assured half the year would be run without competition within the 100-mile radius of their respective tracks.

11.

By Act 203 of 1987, effective June 30, 1987, the Louisiana legislature established off-track wagering. La.R.S. 4:211, et seq. governs the authorization, establishment, ownership and management of off-track wagering facilities.

12.

Pursuant to La.R.S. 4:211, et seq., only those race tracks conducting race meetings during the 1986-87 racing season and licensed prior to June 30, 1987 may be licensed to own and/or operate off-track wagering facilities in Louisiana.

13.

On information and belief the existing race tracks granted exclusivity by this restriction caused this provision to be placed into law to protect existing monopolies and to restrain other associations licensed by the LSRC subsequent to 1986-87 from entering into the live racing and off-track wagering business.

14.

Similar to the statutory 100-mile radius rule for race tracks, off-track wagering facilities are statutorily controlled by a 55-mile radius, measured from the parish seat in the parish where the off-track wagering facility is located. La.R.S. 4:215(b) provides a formula for general ownership of off-track wagering facilities when more than one live racing facility is located less than 55 miles from the parish seat in the parish which they are located. La.R.S. 4:215(c) provides for ownership of off-track wagering facilities in parishes whose parish seat is 55 miles or more from the live racing facility.

15.

In 1987, when the off-track wagering provisions were established, Jefferson Downs and the Fair Grounds were owned separately. Marie Krantz and Bryan Krantz were the majority owners of Jefferson Downs. They did not, however, have a majority interest in the Fair Grounds.

16.

Louisiana Offtrack Betting Corporation, Inc. was incorporated by John A. Lohman on January 22, 1987. Upon information and belief, the officers and directors were John A. Lohman, President, Bryan Krantz, Executive Vice President, and Marie Krantz, Statutory Agent.

17.

On information and belief, this company was incorporated for the purpose of lobbying the Louisiana Off-track Wagering Law which was enacted in 1988. John A. Lohman was the chief lobbyist of this legislation and responsible for the passage of this legislation. John A. Lohman was paid by Bryan and Marie Krantz through Louisiana Offtrack Betting Corporation for his lobbying efforts which resulted in the passage of the Louisiana Off-track Wagering Law, LSA-R.S. 4:211, et seq.

18.

On information and belief, John A. Lohman together with and under the direction of Marie Krantz and Bryan Krantz were the engineers of the Off-track Wagering Law.

19.

On information and belief, Marie Krantz and Bryan Krantz, at the same time that they were lobbying for passage of the Off-track Wagering Law, were also engineering and conspiring to create a monopoly of the off-track wagering facilities and live racing facilities within the defined market.

20.

On information and belief, Marie Krantz and Bryan Krantz were negotiating for the purchase of the Fair Grounds Corporation and its proposed off-track wagering facilities at

the same time they were lobbying for passage of LSA-R.S. 4:211, et seq.

21.

After they established off-track wagering facilities pursuant to La.R.S. 4:211, et seq., Jefferson Downs and the Fair Grounds, were governed by La.R.S. 4:215(b) because their facilities were within a 55-mile radius of the parish seat. In lieu of the joint ownership of off-track wagering facilities, as permissible in La.R.S. 4:215(b), they agreed to divide up the parishes within their defined 55-mile radius.

22.

Paric, Inc., the successor to Finish Line was incorporated by John A. Lohman on March 1, 1983. On February 5, 1988 John A. Lohman changed the name of the corporation from Paric, Inc. to Finish Line Management, Inc. and added Bryan Krantz and Marie Krantz as officers and directors of the corporation. In June of 1988 following the passage of the off-track wagering legislation, the registered address of the corporation was changed to 1300 Sunset Boulevard, Kenner, Louisiana (which is the location of Jefferson Downs). John A. Lohman was replaced as agent for service of process for the corporation with Rickie Glenn Conway, nephew of Marie Krantz and employee of Marie Krantz. John A. Lohman was replaced as President by Bryan Krantz. Rickie Glenn Conway was appointed Vice President and General Manager of the corporation and Marie Krantz was named Secretary/Treasurer of Finish Line.

23.

In June of 1988, Bryan and Marie Krantz became 100% stockholders of Finish Line. Finish Line was to operate all off-track wagering facilities owned by Jefferson Downs. Finish Line entered into a management contract with Jefferson Downs whereby Jefferson Downs was contractually obligated to pay Finish Line 80% of all commissions earned, plus all admissions and concessions earned by the off-track wagering facilities.

24.

On information and belief, Finish Line was incorporated as a Sub-chapter S corporation.

25.

In 1989, Bryan Krantz and Marie Krantz obtained 100% ownership of stock in Jefferson Downs, also a Sub-chapter S corporation.

26.

Jefferson Downs built four off-track wagering facilities in the immediate area, and aggressively promoted its off-track wagering facilities, and, upon information and belief, allowed live racing to deteriorate. Income from the off-track wagering facilities, the majority of which goes to Finish Line, and essentially to Bryan and Marie Krantz, continued to increase. Upon information and belief, live racing at Jefferson Downs reflected a potential loss.

27.

After the closure of Jefferson Downs as a live racing facility in 1992, the LSRC continues to let it operate as an off-track wagering facility. The majority of the income from this additional off-track wagering facility goes to Finish Line, and essentially for the benefit of Bryan and Marie Krantz.

28.

On information and belief, the five off-track wagering facilities formerly owned by Jefferson Downs, now transferred to Fair Grounds, are allowed by the LSRC to file its required reports as if it were a live racing facility. There are separate reports filed with the LSRC by Fair Grounds for its original off-track betting parlors, and separate reports filed by Finish Line Management for the five former Jefferson Downs off-track wagering facilities.

29.

In 1990, Fair Grounds was the only live racetrack operating within a 100 mile radius of Jefferson Downs. In 1990, Bryan and Marie Krantz obtained controlling interest in Fair Grounds, a publicly owned corporation. At that point

Bryan and Marie Krantz had secured a monopoly on live horse racing within a 100-mile radius of Jefferson Downs.

30.

After Bryan and Marie Krantz acquired controlling interest in Fair Grounds, the Fair Grounds continued to operate its off-track wagering facilities.

31.

In August 1992, upon information and belief, under the guise that Jefferson Downs would lose money (without benefits of off-track betting revenue), Bryan Krantz advised the LSRC that Jefferson Downs would close in November 1992, and requested that the off-track wagering facilities owned by Jefferson Downs be transferred to Fair Grounds. Upon information and belief, had the revenues from the off-track wagering facilities been included, Jefferson Downs' financial statement would have proved to be the most profitable race track in Louisiana.

32.

On information and belief, Bryan and Marie Krantz elected to close Jefferson Downs because it was in competition with the Fair Grounds.

33.

Subsequent to the closure of Jefferson Downs, and concurrent with the transfer of the former Jefferson Downs OTB parlors to the Fair Grounds, Bryan Krantz and Marie Krantz voted their controlling interest in the Fair Grounds to approve a contract with Finish Line, which provided that Finish Line retain 99.9% of the pari-mutuel revenue generated by the former Jefferson Downs off-track wagering parlors. In addition, all concessions, admissions and video poker revenues are retained by Finish Line.

34.

On information and belief, Bryan and Marie Krantz planned to transfer the Jefferson Downs parlors to Fair Grounds with Finish Line Management, their wholly owned company, operating these off-track wagering parlors. It was their intent that all profits from the operation of these five

off-track wagering parlors be funneled directly to them through Finish Line Management thereby evading distribution of profits to Fair Grounds shareholders.

35.

On information and belief, Bryan and Marie Krantz acted in concert with those defendants discussed who acted under color of state law.

36.

In October of 1992, LDRA was formed to replace the live racing dates abandoned by Jefferson Downs, together with additional quarter horse racing dates. On October 26, 1992, LDRA applied for a racing permit with the LSRC. Despite strenuous opposition by defendants Jefferson Downs and Fair Grounds, the LSRC awarded a racing permit to LDRA on December 10, 1992.

37.

The site in Livingston Parish which was approved by the LSRC is located within the 100-mile radius for live racing and the 55-mile radius for off-track wagering parlors formerly shared by Jefferson Downs and the Fair Grounds.

38.

In addition to the live race track, LDRA's business plan included the construction of a major truck stop, a show horse arena, a 200-unit motel and a recreation vehicle park. The business plan has subsequently been amended to include plans for conducting Nascar sanctioned stock car racing and N.H.R.A. drag racing.

39.

The development proposed by LDRA would have been the largest employer in Livingston Parish and would generate significant revenues for both state and local government. LDRA's project was the type which fell with the stated purpose of the racing statutes contained in La.R.S. 4:141, et seq.

Specific Acts in Furtherance of The Conspiracy to Protect the Monopoly

40.

At that point, defendants began a series of actions in order to prevent LDRA from ever opening, and thereby allowing defendants to maintain their monopoly within the market. Defendants' actions include the filing of various sham lawsuits, as fully discussed below. Defendants' motives in filing these baseless lawsuits, upon information and belief, was not based upon realistic expectations of success on the merits, but was instead an improper attempt to interfere directly with the business of LDRA, a potential competitor of the defendants.

41.

On December 11, 1992, just one day after the LSRC granted a racing permit to LDRA, defendants Jefferson Downs and Fair Grounds, as well as other parties, filed suit against the LSRC in the case captioned Jefferson Downs Corporation, Inc., et al. v. Louisiana State Racing Commission, Suit No. 92-20961, Division "G," Civil District Court for the Parish of Orleans, State of Louisiana. Defendants sought to annul and set aside the decision of the LSRC on December 10, 1992, granting a racing permit to LDRA. The defendants were being represented as petitioners by Salvador Anzelmo in the CDC litigation and Larry Bankston of the law firm Hoffman, Sutterfield, Ensenat & Bankston in collateral litigation filed against LDRA, as discussed below.

42.

On information and belief this baseless lawsuit was filed for the sole purpose of preventing LDRA from conducting the required referendum in Livingston Parish to permit live horse races.

43.

On December 14, 1992, defendants supplemented and amended their petition, seeking an order staying a referendum election in Livingston Parish on whether the

citizens of Livingston Parish wanted live racing within the parish, and prohibiting the Secretary of State from putting the proposition to authorize racing meetings in Livingston Parish on the ballot.

44.

This litigation continued through 1994, including various decisions by the trial court being ruled upon by the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court. By decision of May 26, 1994, the Louisiana Fourth Circuit Court of Appeal upheld the Racing Commission's decision granting the racing license to LDRA. During the pendency of this litigation, however, defendants continued to use the legal system in an attempt to interfere directly with the business of LDRA, in order to maintain their monopoly by preventing LDRA from ever conducting live racing in Livingston Parish.

45.

The Police Jury for the Parish of Livingston already had an election scheduled to be held on January 16, 1993, and added the proposition of whether the business of horse racing would be conducted in Livingston Parish to the regularly scheduled election. Because of the actions by the defendants in filing their lawsuit in Orleans Parish seeking to stay the referendum election regarding racing in Livingston Parish, Al J. Ransome filed suit against the Secretary of State for the State of Louisiana, seeking a writ of mandamus, directing the Secretary of State to perform all administrative duties in connection with the holding of the special election called for on January 16, 1993 in Livingston Parish. The suit was captioned Al J. Ransome v. The Secretary of State for the State of Louisiana, Suit No. 67,710, 21st Judicial District Court, Parish of Livingston, State of Louisiana.

46.

On January 4, 1993, a petition of intervention was filed in Suit No. 67,710 by Karen Thomas. Karen Thomas is a legal secretary in the firm of Larry Bankston, counsel of record for Jefferson Downs and Fair Grounds in the

Louisiana State Racing Commission lawsuit filed by the same defendants. Karen Thomas sought to be allowed to intervene and to oppose the writ of mandamus through preliminary and injunctive relief. The intervention alleged as the basis for opposition to the writ of mandamus that the "notice" provisions of the Louisiana Election Code had not been complied with.

47.

On January 4, 1993, Karen Thomas filed a separate suit for preliminary and permanent injunction against the Secretary of State of the State of Louisiana in the suit captioned Karen Thomas v. Secretary of State of Louisiana, Suit No. 67,728, Division "B," 21st Judicial District Court, State of Louisiana. The petition sought to restrain, enjoin and prohibit the Secretary of State from conducting the special referendum election in Livingston Parish on January 16, 1993.

48.

On information and belief Larry Bankston directly solicited the representation of Thomas and Thomas' name to benefit the real parties in interest which were his clients, the Krantz family gambling interests.

49.

Defendant, Committee to Control Gambling, was incorporated on January 8, 1993 to oppose the referendum election in Livingston Parish. This was just eight days prior to the election. Upon information and belief, the officers of the Committee, Peter Henry and George Boudreaux were and are employees of Jefferson Downs and Fair Grounds. Upon information and belief, the Committee was incorporated by the law offices of Larry Bankston. Harris and Associates, who also represents the Krantzs in their various corporations, was hired by the Committee to conduct a massive negative media campaign in Livingston Parish in hopes of persuading citizens of Livingston Parish to vote down the referendum election on live racing in Livingston Parish.

50.

On information and belief, the Committee to Control Gambling was organized to conceal the involvement of the Krantz family gambling interests in opposing the referendum election, through false and misleading campaign literature and advertisement, all in violation of the election laws of the State of Louisiana.

51.

On information and belief, it was necessary that the Krantz family gambling interests, the largest purveyors of video poker in Louisiana, hide their involvement in the Committee to Control Gambling which conducted a massive negative media campaign citing the evils of live horse racing, off-track wagering and video poker.

52.

On information and belief, the Committee was incorporated as a 501(C)(3) corporation. Participation in an election campaign by a 501(C)(3) is in violation of the Internal Revenue Code.

53.

On information and belief, the Fair Grounds and/or Bryan Krantz and Marie Krantz allowed a video to be filmed at the Fair Grounds race track depicting a child sitting on an adult's lap playing a video poker machine. On information and belief, this commercial was engineered and paid for by Bryan Krantz and Marie Krantz and/or the Krantz family gambling interests and was produced by Continental Advertising, Inc. which is owned by Bryan and Marie Krantz.

54.

On information and belief, Bryan and Marie Krantz supplied this video to the Committee to Control Gambling and authorized its use as a commercial on television stations located in East Baton Rouge Parish, which broadcast into Livingston, East Baton Rouge and West Baton Rouge Parishes to oppose the January 16, 1993 referendum election.

55.

On information and belief, the defendants, deliberately through this video, allowed false and misleading representations to be made to the public in violation of state law.

56.

On information and belief, these efforts by defendants were designed simply to delay and prevent LDRA from ever providing live racing in Livingston Parish, thereby maintaining the monopoly held by defendants.

57.

On information and belief, Larry Bankston directed and facilitated the actions of the Committee to Control Gambling in order to prevent LDRA from ever providing live racing in Livingston Parish, and thereby maintaining the monopoly held by defendants.

58.

On February 14, 1993 the Committee to Control Gambling filed a campaign contribution report with the Commission on Ethics for Public Employees, Campaign Finance Division. Schedule A-1 of this report listed the contributors as Continental Advertising, Inc., $10,000.00, Exposition Apartments, Inc., $10,000.00, Fair Grounds Corporation, $10,572.50, Hans-Horizon Partnership, $5,000.00 and Village Row Partnership, $10,000.00. On information and belief, all of these entities are either owned and controlled by Bryan and Marie Krantz and/or their agents. Continental Advertising, Inc. was incorporated by David R. Sherman, an attorney who represents the Krantzs. On information and belief, Bryan and Marie Krantz own Continental Advertising, Inc. Exposition Boulevard Apartments, Inc. was a partnership with the partners listed as William A. Kurtz, Stephen A. Faulkner, Jr. and John B. Trainor. William A. Kurtz was a former Vice President of Fair Grounds and an employee of Bryan and Marie Krantz. Fair Grounds is majority owned and controlled by Bryan and Marie Krantz. Hans-Horizon Partnership is composed of

Marie Krantz and Wayne E. Thomas. Village Row Partnership is composed of Marie Krantz and Lawrence W. Stoulig, Jr., who is also the accountant for Marie Krantz and her various related entities.

59.

On information and belief, the Committee to Control Gambling conducted a direct mailing campaign to all registered voters in Livingston Parish opposing the January 16, 1993 referendum election. This campaign consisted of a sophisticated three panel brochure which was mailed by bulk mail from the printing offices of Jesse Bankston, uncle of Larry Bankston, using Jesse Bankston's bulk mailing permit number.

60.

On information and belief, Larry Bankston directed and facilitated the actions of the Committee to Control Gambling in order to simply prevent LDRA from ever providing live racing in Livingston Parish, and thereby maintaining the monopoly held by defendants.

61.

LDRA filed its application to the LSRC for a 10-year racing license to conduct specific racing dates in September 1993 through April 1994 and requested to be placed on the January 21, 1993 LSRC meeting agenda. The LSRC made no reply to these requests by LDRA and this item was not placed on the agenda of the LSRC meeting nor was it heard at the January 21, 1993 meeting.

62.

On information and belief, Oscar Tolmas acting as Chairman of the LSRC under color of state law and without legal authority, assumed total control over which requests made to be placed on the LSRC agenda would be accepted for hearing.

63.

On January 8, 1993, the petition for writ of mandamus was granted in Suit No. 67,710, forcing the Secretary of State to hold the referendum election in

Livingston Parish. The court denied the preliminary and permanent injunction requested by defendant Karen Thomas, as intervenor.

64.

On January 11, 1993, Karen Thomas filed a notice of suspensive appeal and filed an emergency writ to the First Circuit Court of Appeal, in Suit No. 93-CW-0031. On January 12, 1993, the emergency writ was denied by the First Circuit Court of Appeal.

65.

On January 12, 1993, an emergency writ was taken to the Louisiana Supreme Court by Karen Thomas, captioned No. 93-CC-0103. On January 14, 1993, the emergency writ was denied by the Louisiana Supreme Court.

66.

Karen Thomas then filed for rehearing on January 15, 1993 to the Louisiana Supreme Court which was denied. Larry Bankston and his law firm successfully kept the Thomas litigation alive until October 13, 1995 when the First Circuit Court of Appeal dismissed the case as moot.

67.

On information and belief, this litigation was kept alive as an obstacle to prevent the development of LDRA by putting potential investors on notice that if this suit was successful, LDRA could not legally operate.

68.

All of these efforts by defendants were, upon information and belief, simply to prevent LDRA from ever providing live racing in Livingston Parish, and thereby maintaining the monopoly held by defendants.

69.

Despite the massive negative media campaign waged against the January 16, 1993 referendum election the proposition of "shall the business of horse racing be conducted within the Parish of Livingston . . ." was overwhelmingly passed by a 54% margin.

70.

On February 25, 1993, Terrence Lee Odom, an alleged "concerned citizen" and spouse of Tina Simoneaux Odom, former 9-year employee of the law firm of Hoffman, Sutterfield, Ensenat and Bankston, through his attorney Larry Bankston, filed a Petition to Nullify the January 16, 1996 referendum election, Suit #68,130, Division "F," Livingston Parish.

71.

On information and belief, Larry Bankston directly solicited the representation of Odom and Odom's name to benefit the real parties in interest which were his clients, the Krantz family gambling interests.

72.

The court, pursuant to LSA-R.S. 18:1409 of the Louisiana election code, set a trial on Odom's petition to nullify election in Suit #68,130 on March 1, 1993. Larry Bankston, counsel for Odom, filed a Motion for Continuance, on March 1, 1993 which was denied by the trial judge. On March 1, 1993 the court, on its own motion, dismissed the petition as premature, because the validity of LDRA's racing license was in litigation in separate proceedings in Orleans Parish, Civil District Court. The trial court granted Odom a suspensive appeal.

73.

The First Circuit Court of Appeal reversed the trial court's finding of prematurity in Odom's suit and remanded the case to the trial court. LDRA and the Livingston Parish Police Jury attempted to conduct discovery in this litigation, which was vehemently opposed by counsel for Odom who has succeeded in keeping this litigation alive while impeding discovery and delaying a trial on the merits.

74.

All of these efforts, upon information and belief, are simply to prevent LDRA from ever providing live racing in Livingston Parish and thereby maintaining the monopoly created for defendants and thereby putting potential investors

on notice that if this suit was successful, LDRA could not legally operate.

75.

At the January 21, 1993 LSRC meeting, the license application of the Fair Grounds to transfer the OTB license and parlors formerly owned by Jefferson Downs to Fair Grounds was listed on the meeting agenda. This item was tabled by the LSRC at its December 1992 meeting. At the December meeting, the LSRC voted to place in escrow any and all funds earned by the horsemen for purse money from the operation of these parlors until such time as the transfer is voted upon. The LSRC further voted to conduct a full evidentiary hearing on the transfer of these parlors. This was not done then, nor, upon information and belief, has this ever been done. The LSRC continued this matter at the January 1993 meeting.

76.

On January 29, 1993 LDRA filed a second formal application with the LSRC for a 10-year racing license to conduct specific race dates in September 1993 through April 1994 and requested to be placed on the March 11, 1993 LSRC meeting agenda. LDRA received no response from the LSRC. LDRA was not placed on the March 11, 1993 LSRC meeting agenda, nor was it heard at the March 11, 1993 LSRC meeting. On February 4, 1993 Oscar J. Tolmas, Chairman, unilaterally, without action by the other racing commissioners, released the funds placed in escrow by full vote of the LSRC at its December 1992 meeting to Jefferson Downs for use "by Bryan Krantz as he sees fit."

77.

On January 13, 1993 LDRA filed a Petition for Damages Under the Louisiana Unfair and Deceptive Trade Practices Act and for Temporary Restraining Order, Preliminary and Permanent Injunction, Suit #67,822, Division "C," Livingston Parish. The original defendants were Committee to Control Gambling, Harris and Associates and Southern Media and Opinion Research and the suit was

amended to add Jefferson Downs, Fair Grounds, Finish Line Management, Louisiana Downs, Delta Downs and Evangeline Downs as defendants.

78.

LDRA notified all counsel of record regarding its application for a temporary restraining order. Larry Bankston was not listed as counsel of record for any of the defendants at this time. However, Larry Bankston filed a writ with the First Circuit Court of Appeal seeking to reverse the TRO on the grounds that he as counsel for Jefferson Downs had not been notified. **Bankston deliberately lied in order to obtain reversal of the TRO**. At that time, Bankston had never appeared as counsel of record for Jefferson Downs, Fair Grounds, Finish Line Management, Bryan Krantz or Marie Krantz in any action in any court involving LDRA or any other party.

79.

On information and belief, these efforts by defendants were designed simply to delay and prevent LDRA from ever providing live racing in Livingston Parish thereby maintaining the monopoly held by defendants.

80.

It was not until February 4, 1993, that Larry Bankston was substituted as counsel in Suit #67,822 for Committee to Control Gambling, Harris and Associates and Southern Media and Opinion Research, Jefferson Downs, Fair Grounds and Finish Line. Bankston immediately filed a Motion for a Legislative Continuance pursuant to LSA-R.S. 113:4163 and was granted a continuance until sixty days after the date of the legislative adjournment of discovery of all Bankston's clients who were the majority of the defendants.

81.

On information and belief these efforts by defendants were designed simply to delay and prevent LDRA from ever providing live racing in Livingston Parish, thereby maintaining the monopoly held by defendants.

82.

On March 22, 1993 LDRA filed its third formal application for a 10-year racing license to conduct specific race dates in September 1993 through April 1994 to be placed on the April 15, 1993 LSRC meeting agenda. At the April 15, 1993 LSRC meeting Al Ransome, Chairman and CEO of LDRA, requested of Chairman Tolmas that he place the item of LDRA's license prior to the transfer of the Jefferson Downs OTB parlors to Fair Grounds in order to protect LDRA's right to assert a claim to the parlors. Chairman Tolmas refused, stating that LDRA would not get its license until the Fair Grounds got the Jefferson Downs OTB parlors.

83.

At the April 15, 1993 LSRC meeting, during the hearing on the Fair Grounds' application for the transfer of the Jefferson Downs OTB parlors, representative Arthur Morrell requested legislative privilege and a motion was passed by the LSRC granting legislative privilege to Representative Morrell and postponed the matter of the transfer of the Jefferson Downs OTB parlors to Fair Grounds until sixty days after the end of the legislative session.

84.

Immediately following this motion Chairman Tolmas called a recess and an illegal ex parte discussion was held between Chairman Tolmas, Albert Stall, Melinda Tucker and representatives of the Fair Grounds.

85.

Immediately thereafter, when the issue of LDRA's license was taken up, Ms. Tucker, Assistant Attorney General assigned to the LSRC, read into the record that if LDRA was granted its license and racing dates LDRA could have a legal challenge to claim a share of the Jefferson Downs OTB parlors. The LSRC then deferred action on LDRA's application without reason and LDRA was told to reapply in May.

86.

All of these efforts, upon information and belief, are simply to prevent LDRA from ever providing live racing in Livingston Parish, and thereby maintaining the monopoly created for defendants.

87.

On April 20, 1993 LDRA filed a Petition for Writ of Mandamus, Suit #93-6366, Division "F," Civil District Court for the Parish of Orleans, against the LSRC, requesting the court to issue a writ of mandamus compelling the LSRC to convene a meeting on or before May 1, 1993 to consider LDRA's application for racing dates and to grant LDRA's application for the fall, 1993 and spring, 1994 racing season.

88.

On April 22, 1993 Larry Bankston, counsel for Odom, Suit #68,130, 21st JDC, (also counsel for Karen Thomas, Fair Grounds, Jefferson Downs, Finish Line Management, Committee to Control Gambling, Harris and Associates, Southern Media and Opinion Research and Bryan and Marie Krantz) filed a petition for intervention on behalf of Odom, who had no standing in this matter, in the Orleans Suit #93-6333 and a motion for continuance asserting legislative privilege. These efforts by defendants were designed simply to delay and prevent LDRA from ever providing live racing in Livingston Parish thereby maintaining the monopoly held by defendants.

89.

Eventually on April 28, 1993 the mandamus was heard before Judge Magee who ordered that the matter of LDRA's application for fall, 1993 and spring, 1994 racing dates and 10-year license be heard at the May meeting of the LSRC and that this delay will not prejudice LDRA's rights.

90.

On April 9, 1993 LDRA filed a Petition for Damages Under the Louisiana Unfair and Deceptive Trade Practices Act and for Damages Under the Louisiana Anti-Restraint of Trade and Anti-Monopoly Act and for Temporary

Restraining Order, Preliminary and Permanent Injunction, Suit #68,605, Division "C," Livingston Parish. The named defendants were Bryan Krantz, Marie Krantz, Finish Line Management, Fair Grounds Corporation and Oscar J. Tolmas, Individually. Larry Bankston immediately enrolled as counsel of record for all Fair Grounds related defendants which were the majority of the defendants.

91.

On May 4, 1993 Suit #67,822 and Suit #68,605 were consolidated. Fair Grounds, Jefferson Downs and Finish Line Management immediately filed numerous exceptions.

92.

The LSRC held its next meeting on May 27, 1993 at which time the LSRC was served with a temporary restraining order barring any action on the transfer of the Jefferson Downs OTB parlors and license to Fair Grounds. This order was issued by Judge Bernadette Johnson in Suit 93-8567, Civil District Court for the Parish of Orleans. Representative Morrell was counsel of record for the plaintiff, Bart Johnson, in this action against Jefferson Downs. Representative Morrell previously requested and was granted a legislative continuance at the April 15, 1993 LSRC meeting. However, at its May 27, 1993 meeting the LSRC revoked this continuance, ignored the temporary restraining order issued by the Orleans district court and approved the Fair Grounds' application for transfer of the Jefferson Downs OTB license and transfer of the OTB parlors to the Fair Grounds. The LSRC was held in contempt by the Fourth Circuit Court of Appeal for its violation of the writ of mandamus issued by Judge Johnson. This matter is on appeal by the LSRC to the Louisiana Supreme Court. Only after the transfer of the Jefferson Downs OTB license and parlors to Fair Grounds did the LSRC award LDRA a 10-year racing license and fall, 1993 and spring, 1994 racing dates.

93.

On June 30, 1993 LDRA obtained a $17 million default judgment against Chairman Oscar Tolmas in the consolidated antitrust actions, Suit #67,822 and Suit #68,605. Chairman Tolmas was embroiled in litigation with LDRA, filing a Petition for Nullity and for Injunctive Relief in Orleans, Suit #93-13365. Throughout this entire litigation, Chairman Tolmas remained on the commission despite LDRA's requests for his removal and continued to address and vote on matters pertaining to LDRA. On information and belief, Chairman Tolmas acted under color of state law and in concert with defendants to delay and prevent LDRA from ever conducting live racing in Livingston Parish thereby maintaining the monopoly held by the defendants.

94.

On information and belief, Mr. Tolmas' conduct towards LDRA was not only improper but he was acting out of malice under color of state law.

95.

The LSRC continually ignored LDRA's requests to be placed on their meeting agendas for consideration of its OTB license. On June 29, 1993 the LSRC advised LDRA that it could never be put on the agenda for consideration of its OTB license. LDRA made two subsequent requests with the LSRC, December 23, 1993 and January 8, 1994 for preliminary approval to establish an OTB facility on site at LDRA's main facility pursuant to LSA-R.S. 4:213 and R.S. 4:214(D). These requests were denied by the LSRC. All other licensed racing associations are allowed to operate their main facilities as OTB's.

96.

Unable to obtain any relief before the LSRC, on October 19, 1993 LDRA filed a Petition for Declaratory Judgment regarding the constitutionality of the restrictive definition contained in LSA-R.S. 4:211(5), Suit #399,563, 19th JDC, East Baton Rouge Parish.

97.

In October of 1993, after having been awarded racing dates for the 1994-95 racing season, LDRA was advised by Paul Burgess, Executive Director of the LSRC, to submit a letter to the LSRC requesting return of its $5,000.00 deposit for the 1993-94 racing dates. Since the deposit for the 1993-94 had been replaced by the deposit for the 1994-95 racing dates it was customary to return the deposit for the 1993-94 racing dates. Although this refund has been routinely approved by the chairman in the case of all other racing associations, LDRA was required to appear before the LSRC. At the LSRC meeting of October 27, 1993 Chairman Tolmas recused himself because he was in litigation with LDRA (the only time that he did so) and turned the meeting over to the Second Vice Chairman, Albert Stall, even though the First Vice Chairman was present. There is no provision of state law that permits a commission member to recuse himself to avoid a conflict of interest.

98.

At the October 27, 1993 Albert Stall conducted an inquisition of LDRA on matters totally unrelated to the deposit matter on the agenda. Acting without logical basis, the LSRC voted to refuse to refund the deposit until after the racing dates relinquished by LDRA for the 1993-94 meet would have ended had the meet been run. The LSRC has continually refused to refund this deposit as well as other deposits in their possession to LDRA. On information and belief, the LSRC actions were under color of state law and were designed to harass LDRA, and deplete its assets in furtherance of preventing LDRA from ever providing live racing in Livingston Parish thereby maintaining the monopoly held by defendants.

99.

On December 28, 1993, LDRA again applied to be placed on the agenda of January 27, 1994 LSRC meeting for consideration of a preliminary license to operate as an O.T.B. site on the site of its race track. This was done in accordance

with the law and rules of racing. LDRA properly argued that R.S. 4:213 grants the right to own and operate O.T.B. parlors, while the definition contained in R.S. 4:211(5) operates to deny that right. It further alleged that the Racing Commission has never promulgated rules to interpret and resolve the conflicting sections of the statute, and the unsupported opinion of its attorney was insufficient grounds to deny a hearing to LDRA. It was specifically requested that prompt notification (the law requires 20 days notice) of approval to be on the agenda, citing the need to subpoena witnesses and records necessary to present its case. LDRA clearly stated that its case was based on the interpretation of conflicting sections of the law, and not a challenge to the constitutionality of the law.

100.

Chairman Tolmas again refused to respond to LDRA's letter of December 28, 1993, and refused to advise of his decision not to place LDRA on the LSRC meeting agenda until the day notices for meetings were mailed, which was six days before the meeting.

101.

LDRA immediately requested that subpoenas be issued and also requested a response from the LSRC if there were a problem. On information and belief, Larry Bankston on January 21, 1994 in an illegal ex-parte communication with Oscar Tolmas, urged Tolmas to deny LDRA's application. Bankston sent a letter to the LSRC filled with misrepresentations of facts and alleged strong opposition by the Governor to LDRA, which, upon information and belief untrue.

102.

On January 24, 1994, Larry Bankston, on behalf of the Fairgrounds Corporation filed with the LSRC a Motion to Quash LDRA's subpoenas and requested that the Commission not take any action on LDRA's request, pending outcome of a suit filed by LDRA for Declatory Judgment on the constitutionality of R.S. 4:211(5). Bankston did not copy

LDRA with this correspondence. Under administrative law, the Fair Grounds was without standing to file such a motion. Mr. Bankston's motion clearly indicated that the Commission had shared in an ex parte communication with Bankston all of LDRA's correspondence. However, the Commission did not provide LDRA with a copy of Mr. Bankston's motion or letters, nor did Bankston copy LDRA with any of its correspondence with the LSRC.

103.

Although the LSRC claims that it did not act on this motion, it nevertheless it refused to issue the subpoenas.

104.

On January 27, 1994, when LDRA's request was heard, it learned for the first time of the motion to quash. Prior to allowing LDRA to be heard, Melinda Tucker read into the record a history of LDRA's appearances before the Commission which, on information and belief, was deliberately slanted to discredit LDRA before the Commission, and also emphasized Bankston's misrepresentation of the Governor's opposition.

105.

Although all witnesses sought to be subpoenaed by LDRA were present, Chairman Tolmas, at the urging of Melinda Tucker, refused to allow LDRA to call witnesses. Although all documents requested were in the possession of the Commission, the Commission refused to provide such records. Over objections of Melinda Tucker, Chairman Tolmas agreed to let LDRA proffer into the record questions which would have been asked of the witnesses. LDRA was denied the right to question Melinda Tucker on questions of law and the basis of her interpretation of the conflicting statutes in favor of the Fairgrounds Corporation.

106.

Although a representative of Mr. Bankston's law firm, Hoffman, Sutterfield, Ensenat and Bankston, was present, Ms. Tucker asked that Mr. Sal Anzelmo be allowed to speak for Mr. Bankston. Throughout the hearing, Ms. Tucker

prompted and urged Mr. Anselmo to object or respond to LDRA's presentation. On numerous occasions, LDRA's presentation was interrupted to inquire how much longer it would be, and finally the presentation was cut off by the Chairman. It was clearly obvious that LDRA was allowed to speak as merely a nuisance. Thereafter, without discussion, the Commission voted to take no action until the issue of the Declaratory Judgement was final. Since this process could take years, the Commission has placed another barrier to insure that the Fairgrounds monopoly will continue, and the horsemen will be denied racing dates until after the issue is resolved, assuming LDRA manages to keep alive its efforts.

107.

At the April 29, 1994 LSRC meeting, the LSRC, without the required Bertucci hearing, Board of Medical Supervisors v. Bertucci, 593 So.2d 798, (La.App. 4th Cir.1992), and in violation of LDRA's due process rights, purportedly revoked LDRA's racing license and any and all permits issued to it.

108.

On information and belief, this was done in an attempt to compromise LDRA's standing in the Petition for Declaratory Judgment, Suit #399,563, filed in the 19th JDC on October 19, 1993 by LDRA regarding the constitutionality of R.S. 4:211(5) which contained a restrictive definition limiting OTB rights only to those associations existing in 1986-87 and thereby denying any new association OTB rights.

109.

Immediately following the LSRC's action, Terrence Lee Odom filed a subsequent motion alleging that LDRA's permit was revoked and therefore the election was null and void.

110.

On April 29, 1994 at 11:24 a.m., immediately following the LSRC's purported revocation of its license, LDRA filed a Petition for Trial De Novo and for Suspensive

Appeal of the LSRC decision in Livingston Parish, Suit #71,137. The LSRC filed an Exception of Improper Venue in this suit, which was denied by the trial court and the First Circuit Court of Appeal in a unanimous decision. However, the Louisiana Supreme Court granted LSRC's writ application and reversed the trial court and the First Circuit, sustaining the exception of improper venue and transferring the case to the Civil District Court for the Parish of Orleans. On June 16, 1995 the Louisiana Supreme Court denied LDRA's request for rehearing. The LSRC let this suit lie idle until LDRA pursued the trial on the merits of the declaratory judgment suit in 19th JDC, regarding the constitutionality of the restrictive definition contained in LSA-R.S. 4:211(5).

111.

At the April 29, 1994 LSRC meeting, LDRA was denied the right to any of its subpoenas and was denied the right to question any witness or present any evidence on its behalf. LDRA vehemently protested on the record that the LSRC was violating the APA and the Constitution as set forth in Bertucci, supra, nevertheless, the LSRC voted to revoke all licenses/permits issued to LDRA.

112.

Following the LSRC vote, Chairman Tolmas appointed a committee to investigate LDRA. His appointees were Albert Stall, Sue Granger, Peyton Covington and himself. All appointees had displayed a history of opposition to LDRA. Therefore, LDRA cound not expect fair treatment which was in violation of LDRA's procedural due process rights.

113.

On information and belief, these efforts by defendants were designed simply to delay and prevent LDRA from ever providing live racing in Livingston Parish, thereby maintaining the monopoly held by defendants.

114.

The Fair Grounds intervened in the declaratory judgment, Suit #399,563. Fair Grounds filed an amended

and supplemental Petition for Intervention on January 19, 1994. The Fair Grounds filed a Motion for Summary Judgment on January 20, 1994 and an amended Motion for Summary Judgment joined by the defendants on January 24, 1994.

115.

In the Third Extraordinary Session of 1994, the Louisiana Legislature made extensive revisions to the poker gaming laws, R.S. 33:4862.1, et seq.

116.

During the session, the racing industry supported numerous special provisions deemed necessary to increase revenue for purses which is vital to the economic viability of the race tracks' ability to support live racing and to generate revenue for state and local governments.

117.

Act 12 of the session referenced racing associations in R.S. 33:4862.11(5)(a)(b) and R.S. 33:4862.22. Nowhere in Act 12 can any reference be found to R.S. 4:211(5). More specifically, the following language is enacted in R.S. 33:4862.22 (B)(1):

> "(1), Two-thirds of the funds appropriated to the commission pursuant to this Section shall be allocated and provided to the licensed racing associations in the state which conduct live horse racing. . ."

118.

In Act 13 of the session, parts of R.S. 33:4862.11, 33:4862.18, 33:4862.22, and 33:4862.22 addressed special considerations for the racing industry. None of these amendments made any reference whatsoever to R.S. 4:211(5).

119.

During the course of the session two major bills, H.B. 419 and S.B. 35, which emerged from conference committee to become Act 13, were debated in committees and on the floor of the respective bodies.

120.

Representatives of the racing industry drafted and proposed amendments to R.S. 33:4862.4 which would increase the payoff limits for video poker devices located at establishments where live racing is conducted. Testimony by industry representatives urged enactment of these amendments as measures necessary to maintain and increase purses for the horsemen and as being vital to the economic viability of all licensed racing associations.

121.

At all times during committee and floor debate, no proposed language in any amendment to R.S. 33:4862.4 contained the phrase "as defined in R.S. 4:211(5)", therefore indicating that there was no legislative intent to restrict any benefits of the video poker statutes to racing associations licensed prior to the 1986-87 racing season.

122.

When H.B. 419 and S.B. 35 were merged in conference committee, and no public debate was possible, the restrictive phrase "as defined in R.S. 4:211(5)" was added to R.S. 33:4862.4.

123.

On information and belief, the restrictive phrase "as defined in R.S. 4:211(5)" was added to R.S. 33:4862.4 in conference committee by Senator Larry Bankston. Senator Bankston is representing the Krantz family gambling interests as their attorney in various lawsuits seeking to prevent LDRA from entering into competition with his client.

124.

On information and belief, in violation of state law, La.R.S. 42:1112 and 42:1120, Senator Bankston did not file the required disclosure that he was handling legislation on behalf of his clients, the Krantz family gambling interests.

125.

On information and belief, the restrictive phrase "as defined in R.S. 4:211(5)" was added to R.S. 33:4862.4 for the sole purpose of thwarting LDRA's effort to obtain financing

necessary to build its track, thereby perpetuating the illegal monopoly for Senator Bankston's client

126.

The inclusion of the phrase "as defined in R.S. 4:211(5)" in R.S. 33:4862.4 was effected by subterfuge, and clearly is not the expression or the will of the legislature. There is no legitimate public purpose for the inclusion of this restrictive phrase, which is in conflict with all other provisions of the video poker statutes which confer benefits to all licensed racing associations. The effect of this restrictive language actually serves to defeat the intent and purpose of the legislature in providing revenue for purses and assuring the viability of racing associations to provide live racing dates, and to generate revenue for state and local governments, and could result in the closure of another race track.

127.

Honorable Joseph Keogh granted the Fair Grounds' and defendants' Motion for Summary Judgment in the declaratory judgment action, Suit #399,563, on April 18, 1994. LDRA filed an appeal with the First Circuit Court of Appeal on April 28, 1994. On April 7, 1995 the First Circuit Court of Appeal reversed the summary judgment and remanded the case back to the trial court for the taking of additional evidence.

128.

In the meantime, on January 3, 1995 LDRA filed a second petition for declaratory judgment, Suit #413,022 regarding R.S. 33:4862.4.

129.

On information and belief, Larry Bankston who was then chairman of Senate Judiciary Committee B which promulgated all video poker and gaming legislation inserted the restrictive definition contained in R.S. 4:211(5) into R.S. 33:4862.4 which thereby denied LDRA the right to offer increased video poker payoffs (increased from $500.00 to $1,000.00) at its facility.

130.

Declaratory judgment Suits #399,563 and #413,022 were consolidated on April 21, 1995. LDRA tried to advance this litigation as well as its antitrust litigation. These attempts, however, were continually thwarted by the defendants. LDRA was finally successful in advancing Suit #399,563 to trial on May 28, 1995. On information and belief, the defendants continually resisted discovery attempts by LDRA and engaged in an abuse of the legal system in vain attempts to delay these proceedings.

131.

The Louisiana Horsemen's Benevolent and Protective Association 1993, Inc. intervened on behalf of LDRA in Suits #399,563 and #413,022.

132.

On or about October, 1995 LDRA filed a Motion to Compel documents propounded by LDRA to the LSRC in Suit #413,022. It was at this time that Melinda Tucker finally transferred the license revocation suit from Livingston Parish to Civil District Court for the Parish of Orleans. This suit was originally docketed as Suit #95-15331, Division "J," Civil District Court for the Parish of Orleans. Ms. Tucker again allowed this suit to lie dormant until March of 1996. When it became apparent to Ms. Tucker that her delaying tactics would not succeed in thwarting discovery, nor would the flurry of exceptions filed by the Fair Grounds keep this case from going to trial, she initiated activity on the CDC litigation. On March 1, 1996, Mr. Salvador Anzelmo, current counsel for the Fair Grounds and counsel for the Fair Grounds in Suit #92-20961, on March 1, 1996, initiated and obtained an *ex parte* transfer of this action to Division "G" in hopes of attaining a more favorable forum for his client's interests. This is the same exact scenario, same cast of players, that was enacted when the Fair Grounds attempted to revoke LDRA's permit in the hopes of stopping the referendum election in Livingston Parish from being conducted. This attempt was unsuccessful. This case, Suit

#95-15331, was consolidated with Suit #92-20961 which was closed. On April 4, 1996, defendant filed a Motion to Dismiss and Alternatively a Motion for Declaratory Judgment.

133.

The declaratory judgment action, Suit #399,563 was proceeding to its scheduled trial date of May 28, 1996. Ms. Tucker, in an effort to delay those proceedings, tried to advance the CDC proceedings. On May 15, 1996 the Orleans trial court dismissed LDRA's case with prejudice. LDRA immediately filed writs with the Fourth Circuit Court of Appeal which granted LDRA's stay request on May 23, 1996. The Fourth Circuit, on June 5, 1996 granted certiorari and under its supervisory jurisdiction reversed the judgment of the trial court and remanded the case to the trial court for further proceedings under R.S. 4:158. Ms. Tucker and the Fair Grounds desperately tried to use the Orleans litigation to compromise LDRA's standing in the declaratory judgment suit. All of these efforts, upon information and belief, were simply to prevent LDRA from ever providing live racing in Livingston Parish and thereby maintain the monopoly held by the defendants.

134.

After the LSRC voted to revoke LDRA's license, several commission members, including some defendants, stated publicly that the horsemen needed live racing dates and if LDRA could demonstrate it had financing they would favor LDRA's application for a license. Chairman Tolmas specifically stated on the public record that if financing was obtained that he would do everything in his power to restore the license.

135.

In November of 1994 LDRA obtained a $10 million written commitment for financing of its race track. LDRA then requested that the consideration of its racing license be placed on the agenda for the December 2, 1994 LSRC meeting. Chairman Tolmas refused to place the matter on

the agenda, citing as the reason that the litigation over the purported license revocation was still pending.

136.

At the December 2, 1994 LSRC meeting Al Ransome, Chairman of LDRA, attempted to place into the record its commitment to finance its race track. Chairman Tolmas refused to allow Mr. Ransome to be recognized stating that he was not on the agenda.

137.

Due to the refusal of the LSRC to consider the issue, LDRA's lender withdrew the $10 million commitment to finance the race track.

138.

At the same December 2, 1994, there was no item listed on the agenda referencing Old Evangeline Downs, L.C. On motion of Commissioner Albert Stall, the LSRC suspended the rules and considered the request for a racing license by Old Evangeline Downs L.C.

139.

On information and belief Old Evangeline Downs had not even filed a written application for a racing license as required by the racing statutes.

140.

The site approved by the LSRC in LDRA's license lies within both the 100-mile live racing radius and in part overlaps the 55-mile OTB radius applicable to Old Evangeline Downs, L.C.

141.

Due to the overlap of the 100-mile radius of both the Fair Grounds and Old Evangeline Downs, L.C., LDRA is only eligible for racing dates that fall between the end of the Old Evangeline Downs, L.C. race meet and the beginning of the Fair Grounds race meet.

142.

Although the LSRC, under the direction of Oscar Tolmas and the advise of Melinda Tucker, refused to even address the issue of LDRA's OTB license since it was an

association licensed subsequent to the 1986-87 racing season, the LSRC granted a new license and transferred the existing OTB license from First Statewide Racing d/b/a New Evangeline Downs to Old Evangeline Downs, L.C. on December 2, 1994. On information and belief Old Evangeline Downs, L.C. was organized on October 22, 1994 subsequent to the 1986-87 racing season.

143.

All of these efforts, upon information and belief, in violation of LDRA's equal protection rights, were simply to prevent LDRA from ever providing live racing in Livingston Parish and thereby maintain the monopoly held by the defendants.

144.

Although LDRA filed and was granted a suspensive appeal on April 29, 1994 of the LSRC's purported revocation of its license, the LSRC has refused to recognize LDRA as a licensed racing association and has continually ignored or refused its request to be put on the agenda to hear its application for racing dates as required by law, thereby denying LDRA due process and equal protection under the United States Constitution.

145.

All of these efforts, upon information and belief, were simply to prevent LDRA from ever providing live racing in Livingston Parish and thereby maintain the monopoly held by the defendants.

146.

At the December 14, 1995 LSRC meeting the LSRC, in violation of state law, its own rules and the Administrative Procedures Act, considered an item to permit unlimited simulcast of out of state races under the provisions of La.R.S. 4:149.2.

147.

Under the motion considered by the LSRC, LDRA would have the same rights to unlimited simulcasts of out of

state races. These rights would significantly enhance LDRA's efforts to obtain financing for the race track.

148.

After the close of debate on the matter the LSRC improperly voted on a motion that had been altered to include the restrictive definition contained in La.R.S. 4:211(5), which effectively denied the benefits of the simulcast rule to LDRA, in violation of LDRA's due process and equal protection rights under the U. S. Constitution.

149.

All of these efforts, upon information and belief, in violation of LDRA's equal protection rights, were simply to prevent LDRA from ever providing live racing in Livingston Parish and thereby maintain the monopoly held by the defendants.

150.

Under the LSA-R.S. 4:141 the stated objectives of the statutes is to promote and development the racing and breeding industry and the building of race tracks in the State. Pursuant to this statute the LSRC is charged with the responsibility of carrying out the purposes of the statute.

151.

On information and belief, Albert Stall was appointed Chairman of the LSRC by the newly elected Governor of the State of Louisiana on or about May, 1996.

152.

On information and belief, former Chairman Oscar Tolmas was re-appointed to the LSRC by the newly elected Governor of the State of Louisiana on or about May, 1996.

153.

On information and belief, Payton Covington was re-appointed to the LSRC by the newly elected Governor of the State of Louisiana on or about May, 1996.

154.

In accordance with LSA-R.S. 4:158 on Tuesday, August 13, 1996, via Federal Express, LDRA filed its application for 1997-98 race dates and requested that its

application be placed on the agenda for the August 30, 1996 LSRC meeting agenda.

155.

LDRA had previously submitted $10,000.00 in deposits to the LSRC with previous applications which the LSRC refused to place on the agenda. Since these dates were now moot, LDRA requested that the LSRC apply one of the $5,000.00 deposits previously submitted to its new application for 1997-98 race dates pursuant to LSA-R.S. 4:161(B).

156.

Albert M. Stall, Chairman of the LSRC, without a meeting or vote of the full commission directed Paul A. Bonin, Assistant Attorney General assigned to the LSRC, to notify LDRA that its "letter and its attachments cannot be accepted as an application for a license to conduct a race meeting unless and until the cashier's check is received on or before August 15, 1996." This correspondence was faxed to LDRA on Wednesday, August 14, 1996.

157.

On information and belief and as a matter of public record, LDRA's application for racing dates for the 1996-97 race meet requested that the $5,000.00 LDRA deposit from a previous application be applied to the 1996-97 application. The LSRC accepted LDRA's application under these conditions and applied the previous deposit to the 1996-97 application. Likewise, the $5,000.00 deposit for the December 10, 1992 permit was transferred to the application for the 1993-94 application.

158.

LSA-R.S. 4:161(B) clearly states ". . . the **Commission** in its discretion and at the request of the licensee, may return the fees paid by the licensee for racing upon such days or specify any other days which may replace the days omitted." Chairman Stall without benefit of a full meeting of the commission or a full vote of the commission acted arbitrarily and capriciously in denying LDRA's request.

159.

LSA-R.S. 4:161(B) provides:

"When the race meeting for which the license is granted is terminated and the licensee has fully paid the percentage designated in this Part, the five thousand dollars deposited with the application **shall** be returned."

160.

The race meetings for which LDRA had supplied the previous $10,000.00 deposits were terminated. Since the race days were not run there was no percentage due under this Part, therefore, LDRA was and is entitled to return of its deposits.

161.

Pursuant to Chairman Stall's request, LDRA sent to the LSRC office on Wednesday, August 14 1996, via Federal Express, a cashier's check in the amount of $5,000.00 payable to the Secretary of the Louisiana Department of Economic Development.

162.

This check was received in the LSRC office on Thursday, August 15, 1996. On information and belief, Chairman Stall forced LDRA to deposit the additional $5,000.00 with the clear intention of confiscating the deposit through violations of rules and statutes as clearly demonstrated in the actions described in the following paragraphs.

163.

On information and belief and as a matter of public record, LDRA's deposit submitted with the application for the 1993-94 meet was illegally and improperly confiscated, thereby depriving LDRA of its property in violation of LDRA's constitutional right to due process.

164.

On Wednesday, August 14, 1996, LDRA requested that its deposits, totaling $10,000.00 be returned by the LSRC. LDRA had previously been informed by the

Executive Director of the LSRC, Paul Burgess, that pursuant to LSA-R.S. 4:161(B) this refund must be approved by the full commission in open meeting. Therefore, LDRA requested that the return of its deposits be placed on the agenda for the August 30, 1996 LSRC meeting to be heard by the full commission.

165.

On Friday, August 16, 1996 at 11:10 a.m. LDRA received correspondence via facsimile from Paul Bonin, Attorney for the LSRC, which stated in part:

> "LDRA does not have any funds on deposit with the LSRC. The $5,000 deposit for the 1993/94 race meeting has been transferred to the General Fund and is no longer in escrow or "on deposit". The remaining $10,000 deposits for the 1994/95 and 1995/96 applications for race meetings were made payable to the Secretary of the Department of Economic Development and are in escrow with the State as is the most recent deposit of $5,000 for the pending application for the 1997/98 race meeting.
>
> . . .
>
> For the foregoing reasons there is opposition to the request for the refund of the deposit of $5,000.00 for the 1994/95 race meeting.
>
> . . .
>
> Opposition to the refund for the deposit of $5,000 for the 1995/96 arises from the possibility that the Commission may decide to order that deposit applied to set-off minimum license fees owed by LDRA for the 1993/94 and 1994/95 race meetings."

166.

On Friday, August 16, 1996 at 11:38 a.m. LDRA received via facsimile a Rule to Show Cause issued by the Louisiana State Racing Commission signed by Paul Burgess, Executive Director. The Rule to Show Cause orders LDRA to show cause on the 30th day of August at the LSRC open meeting why it should not be ordered to pay the minimum

license fees as set forth in the rule not later than September 30, 1996.

167.

The LSRC in its Rule to Show Cause cited LSA-R.S. 4:161(C) and/or R.S. 4:161.2(C) which provide "the minimum license fee shall be one thousand dollars per day, except for race meetings exclusively for quarter horses, for which the minimum license fee shall be five hundred dollars per day."

168.

The rule further stated that since LDRA requested and obtained dates for race meetings which were not exclusively for quarter horses it would impose the full one thousand dollars per day fee.

169.

The LSRC further claimed that "the reason for not conducting racing on the granted days was not impossibility for any reason beyond the control and through the fault of LDRA."

170.

The LSRC claims the "sole reason, it appears, for failing to conduct racing on the granted days is the failure of LDRA to construct its race track in a timely fashion. . ."

171.

LDRA requested and obtained 105 days for a race meeting covering a period from September 5, 1993 through March 23, 1994. LDRA did not conduct any races on any of the 105 days.

172.

LDRA on October 12, 1993 requested that these dates be canceled, however, the LSRC refused to place this item on its agenda for hearing at its December 3, 1993 meeting and therefore took no action at that time or any time thereafter.

173.

LDRA requested and obtained 109 days for a race meeting covering a period from September 7, 1994 through

March 26, 1995. LDRA did not conduct any races on any of the 109 days.

174.

The LSRC claims that LDRA's failure to conduct races on the 109 days was not impossibility for any reason beyond the control or through the fault of LDRA. However, on April 29, 1994, without any prior hearing, the LSRC purportedly revoked LDRA's racing license.

175.

LDRA applied for 115 racing days covering the period September 6, 1995 through March 21, 1996, which application was not heard and therefore never granted by the LSRC.

176.

The LSRC in its Rule to Show Cause lists LDRA's Summary of Indebtedness as follows:

> "17. For the 1993/94 race meeting, LDRA owes a balance of $100,000.00, after the application of the $5,000.00 deposit;
>
> 18. For the 1994/95 race meeting, LDRA owes a balance of $109,000.00, however there is a deposit in escrow of $5,000.00 available for set-off, which would reduce the outstanding minimum license fee for the 1994/95 race meeing to $104,000.00 when the deposit is transferred from escrow to the General Fund;
>
> 19. There remains an additional $5,000.00 deposit in escrow for the 1995/96 race meeting applied for which no license was ever granted.
>
> 20. If all deposits in escrow (except for the $5,000.00 deposit for the 1996/97 race meeting for which there is a pending application) were applied to the outstanding overall indebtedness arising from LDRA's failure to pay its <u>minimum</u> license fees, LDRA would then owe the State of Louisiana $199,000.00 in unpaid minimum license fees."

177.

On information and belief, Chairman Stall, under color of state law, issued this rule against LDRA with malice of forethought solely to harass LDRA and thwart any opportunities LDRA may have to finance its project.

178.

On information and belief, the action of Chairman Stall is unprecedented in the history of the LSRC.

179.

The LSRC has routinely issued new racing associations racing dates prior to construction of the racing facility in order to enable the association to secure financing for the development.

180.

On information and belief, the LSRC issued racing dates to Sawyer Downs, the predecessor of Louisiana Downs, for approximately three years prior to this association ever conducting its first live race day.

181.

On information and belief, the LSRC did not attempt to or fine either Sawyer Downs or Louisiana Downs for failure to conduct assigned race dates.

182.

On information and belief, the LSRC issued a racing permit and license to Lindsey Downs to conduct live race days prior to the construction of its racing facility.

183.

On information and belief, the LSRC issued racing dates to Lindsey Downs, prior to this association ever conducting its first live race day.

184.

On information and belief Lindsey Downs never conducted a live race meet.

185.

On information and belief, the LSRC did not attempt to fine or fine Lindsey Downs for failure to conduct live race dates.

186.

On information and belief, the LSRC issued a racing permit and license to Clarence Downs to conduct live race meets.

187.

On information and belief, the LSRC issued racing dates to Clarence Downs.

188.

On information and belief, Clarence Downs did not conduct racing on every day that it was approved to do so by the LSRC.

189.

On information and belief, the LSRC did not attempt to fine or fine Clarence Downs for failure to conduct live race dates.

190.

Effective June 17, 1995, Act 460 of the 1995 Louisiana Regular Session became effective which was enacted "to amend and reenact 4:161(C) and 161.2(C), relative to race meetings; to remove minimum license fees for conducting race meetings; and to provide for related matters." This act is remedial.

191.

On Friday, August 16, 1996 at 12:02 p.m. via facsimile LDRA received a notification from the LSRC which read:

> By virtue of La. R.S. 4:153(1), (3) and (4), you are hereby notified that on Monday, August 26, 1996 beginning at 1:00 p.m. the Commission's Chief Auditor, Mr. Sidney E. Schmitt, accompanied by not more than three employees of the Commission, will commence a preliminay examination of the books, financial statements, memoranda, or other documents of Livingston Downs Racing Association, Inc."

192.

The letter from the LSRC went on to identify seventeen different categories of documents that it demanded LDRA to produce.

193.

On information and belief, this is unprecedented in the history of the LSRC.

194.

The seventeen categories of documents the LSRC identified to be produced by LDRA for the examination, inspection and copying are: "(1) federal and state income tax returns and reports for the years 1993, 1994 and 1995; (2) the corporate minute book(s) containing all minutes and resolutions of the association since its inception; (3) any and all financial audits of the association performed by a Certified Public Accountant since its inception through the present; (4) all bank accounts of the association, including but not limited to all canceled checks, stub records, and monthly bank statements; (5) all credit card records for expenses claimed by Livingston Downs Racing Association, Inc., including but not limited to supporting documentation for expenditures claimed on such credit cards; (6) any and all business plans adopted by the association; (7) copies of any mortgages or counter-letters not of public record regarding the property identified in the association's license; (8) any and all building permits and/or construction contracts for the facilities constructed on or to be constructed on the property identified in the association's license; (9) records of any and all lease or mortgage payments by the association or on its behalf for the property identified in its lease; (10) copies of all notes payable identified in the association's financial statement contained in its application for a 1997/98 race meeting; (11) any other documents necessary to verify information contained in that financial statement as may be requested by the Chief Auditor; (12) all records regarding building depreciation; (13) any and all appraisals of the property identified in the association's license, and (14) all

insurance premiums paid for protection of or insuring of assets of the association; (15) any and all applications for loans submitted to any prospective lender, (16) copies of any and all tax assessments and tax liens, if any, on any and all movable and immovable property of the association, (17) any and all documents pertaining to the wetlands stauts of the property identified in the association's license."

195.

On information and belief, Chairman Stall, under color of state law, arbitrarily and capriciously caused this demand to be issued with malice of forethought solely for the purpose of harassing LDRA and thwart any opportunities LDRA may have to finance its project.

196.

On information and belief, the LSRC did not conduct any audit whatsoever regarding Lindsey Downs.

197.

On information and belief, the LSRC did not conduct any audit whatsoever regarding Clarence Downs.

198.

The LSRC allowed Jefferson Downs to voluntarily close in 1992, thereby breaking its 10-year contract with the LSRC to conduct live racing dates.

199.

On information and belief, although the horsemen requested an audit, the LSRC did not conduct any audit of Jefferson Downs whatsoever.

200.

On information and belief, First Statewide Racing d/b/a Evangeline Downs filed bankruptcy in 1993.

201.

On information and belief, the LSRC did not conduct any audit of Evangeline Downs whatsoever.

202.

Although the Fair Grounds received a tax break from the Louisiana Legislature in the amount of two and one-half

million dollars it has not completed construction on its facility after a fire destroyed it in 1993.

203.

On information and belief, the LSRC did not conduct any audit of Fair Grounds whatsoever.

204.

On information and belief, the LSRC's ***actions are in violation of LSA-R.S. 4:147(6).***

205.

LSA-R.S. 4:147 provides in pertinent part:

> "The commission shall carry out the provisions of this Part, including the following specific duties:
>
> . . .
>
> (6)To make rules and regulations for the holding, conducting, and operating of all race tracks, race meets, and races held in Louisiana, provided such regulations are uniform in their application and effect."

206.

On Friday, August 16, 1996, LDRA requested that the LSRC reschedule its audit due to a scheduling conflict. On August 26, 1996, the date arbitrarily scheduled by the LSRC, LDRA had a hearing with the LSRC scheduled in the 19th JDC regarding Suit #399,563. Furthermore, pursuant to LSA-C.C.P. Arts. 1461 and 1462 had not provided adequate notice.

207.

On Monday, August 19, 1996 at 4:46 p.m. LDRA received correspondence from the LSRC via facsimile refusing the request.

208.

On information and belief, Chairman Stall, under color of state law, arbitrarily and capriciously caused this refusal to be issued with malice of forethought solely to harass LDRA.

209.

On information and belief, Chairman Stall is attempting to use this so-called audit as a means of discovery in the license revocation suit pending in the CDC, Parish of Orleans, Suit #95-15331, and further, to deny LDRA's application for race dates for 1997-98.

210.

On information and belief, Chairman Stall is also attempting to use this so-called audit as a means of discovery of specific items that the LSRC, Fair Grounds and the State of Louisiana were denied in Suit #399,563, 19th JDC, East Baton Rouge Parish, in violation of the protective order issued by the court in that case.

211.

On information and belief, Chairman Stall, under color of state law, is arbitrarily and capriciously with malice of forethought using his position to embarass LDRA and to discover LDRA's proprietary information to be used to the detriment of LDRA at the August 30, 1996 LSRC meeting.

212.

On information and belief, the LSRC's action and more particularly, those of Chairman Stall are arbitrary and capricious and specifically calculated with malice of forethought to thwart any financing effort by LDRA for its race track development. On information and belief, the actions against LDRA are in violation of state law and effectively violate LDRA's right to due process and equal protection of the laws.

213.

On information and belief, the present LSRC Chairman, Albert Stall, is acting under color of state law, in violation of state law, arbitrarily and capriciously to further the interests of Fair Grounds to the detriment of LDRA.

Count I

Claims under 42 U.S.C.A. §1983, 1985(2) and (3) and 1986.

214.

All previous paragraphs are realleged by reference.

215.

42 U.S.C.A. 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

216.

42 U.S.C.A. 1985(2) provides:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on accout of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to

enforce, the right of any person, or class of persons, to the equal protection of the laws;"

217.

42 U.S.C.A. 1985(3) provides:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

218.

42 U.S.C.A. 1986 provides:

"Every person who, having knowlege that any of the wrongs conspired to be done, and mentioned in

section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence cound have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

219.

Defendants are liable to LDRA for damages, costs and attorney's fees pursuant to 42 U.S.C.A. §1983, 1985 (3), 1986 for their actions described above in conspiring to and in denying LDRA due process and equal protection afforded by the Fourteenth Amendment of the United States Constitution regarding its licensing including the purported revocation of its license.

Count II

Anti-Trust Claims

220.

All previous paragraphs are realleged by reference.

221.

15 U.S.C.A. 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

222.

The above described facts demonstrate an attempt thus far successful by the defendants to create a monopoly in the horse racing industry within the relevant market, all in violation of federal anti-trust law.

223.

Defendants are liable to LDRA for damages, treble of such damages, costs and attorney's fees pursuant to federal anti-trust laws, and in particular, 15 U.S.C.A. §15 for their actions described above.

WHEREFORE, plaintiff, Livingston Downs Racing Association, Inc., prays that after due proceedings be had, that judgment be rendered in favor of Livingston Downs Racing Association, Inc. and against the defendants, Jefferson Downs Corporation, Fair Grounds Corporation, Inc., Finish Line Management, Inc., Bryan Krantz, Marie Krantz, Karen J. Thomas, Terrence Lee Odom, Committee to Control Gambling, Peter Henry, George Boudreaux, Oscar J. Tolmas, Albert Stall, Payton Covington, Melinda M. Tucker, Larry Bankston, James Ben Thomas and W. C. Littleton for damages, treble of such damages, appropriate injunctive relief, reasonable attorney's fees, all costs of these proceedings and all other general and equitable relief available.

Respectfully submitted:

Darlene S. Ransome
Bar Roll #21983
5353 Florida Boulevard
Baton Rouge, LA 70806
(504) 928-2620

AND

BREAZEALE, SACHSE & WILSON, L.L.P.
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/s/ Jude C. Bursavich
Victor A. Sachse, III, Bar Roll #11645
Claude F. Reynaud, Jr., Bar Roll #11197
Jude C. Bursavich, Bar Roll #19303

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

CIVIL ACTION

VERSUS
NO.

JEFFERSON DOWNS CORPORATION, FAIR GROUNDS CORPORATION, INC., FINISH LINE MANAGEMENT, INC., BRYAN KRANTZ, MARIE KRANTZ, KAREN J. THOMAS, TERRENCE LEE ODOM, COMMITTEE TO CONTROL GAMBLING, PETER HENRY, GEORGE BOUDREAUX, OSCAR J. TOLMAS, ALBERT STALL, PAYTON COVINGTON, MELINDA M. TUCKER, LARRY BANKSTON, JAMES BEN THOMAS AND W. C. LITTLETON

VERIFICATION

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, duly commissioned in and for the parish and state aforesaid, personally came and appeared:

AL J. RANSOME
PRESIDENT AND CHAIRMAN OF THE BOARD OF
LIVINGSTON DOWNS RACING ASSOCIATION, INC.

who, after being duly sworn, did depose and state:

That he is President and Chairman of the Board of Livingston Downs Racing Association, Inc.

That he has read the foregoing Complaint for Damages and Demand for Trial by Jury; and

That all of the allegations contained therein are true and correct to the best of his knowledge, information and belief.

/s/ Al J. Ransome
Al J. Ransome

SWORN TO AND SUBSCRIBED before me this 30 day of August, 1996.

/s/ Darlene S. Ransome
Notary Public

LOUISIANA STATE RACING COMMISSION

MEETING OF THE LOUISIANA STATE RACING COMMISSION HELD ON WEDNESDAY, SEPTEMBER 26, 1998 AT 11:00 A.M. AT LOUISIANA DOWNS RACE TRACK, COURT YARD BUILDING, 8000 EAST TEXAS STREET, BOSSIER CITY, LOUISIANA

REPORTED BY: SYLVIA C. PASTRANO
CERTIFIED SHORTHAND REPORTER

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-0-

CERTIFIED
A TRUE COPY

/s/ no signature
Executive Director
Louisiana State Racing Commission

. . .

[60]

MR. STALL:

You want to poll the commission, make sure we have the right--Just call for a vote. All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. STALL:

All opposed? (None) Deal is on.

MR. MEAUX:

Mr. Chairman, I make a move we go into executive session to discuss pending litigation.

MR. COVINGTON:

Second.

MR. STALL:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. STALL:

All opposed? (None)

(There was executive session.)

MR. MEAUX:

Mr. Chairman, I move to come out of executive session.

MR. STALL:

[61]

Do we have to get a second?

MR. COVINGTON:

Second.

MR. STALL:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

MR. TOLMAS:

Mr. Chairman, make a motion that we adjourn.

MR. COVINGTON:

Second.

MR. STALL:

All in favor say aye.

COMMISSION MEMBERS:

Aye.

[62]

-0-

CERTIFICATE

I, the undersigned reporter, do hereby certify that the above and foregoing is a true and correct transcription of the stenographic notes of the proceedings herein, taken down by me and transcribed under my supervision, at the time and place hereinbefore noted, in the above-entitled and -numbered cause(s).

I further certify that the witness(es) was duly sworn by me in my capacity as Certified Court Reporter for the State of Louisiana; that I am not of counsel nor related to any of the counsel or any of the parties, nor in the employ of any of them, and that I have no interest in the outcome of this action(s).

/s/ Sylvia C. Pastrano

Sylvia C. Pastrano

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

No. 00-297

In The

Supreme Court of the United States

LIVINGSTON DOWNS RACING ASSOCIATION, INC.,
Petitioner,

v.

LOUISIANA STATE RACING COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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REASON FOR DENYING WRIT

This court should deny the petition for writ of certiorari because the Louisiana Supreme Court did not decide any important question of federal law in a way that conflicts with relevant decisions of this Honorable Court.

STATEMENT OF THE CASE

1. Introduction to Facts

This is an action against the Louisiana State Racing Commission ("Racing Commission") arising from the revocation of a license issued to Livingston Downs Racing Association ("Livingston Downs") to operate a racetrack under La. Rev. Stat. Ann. § 4:158.[1]

The Racing Commission is an agency created and assigned to the executive branch of Louisiana government by statute.[2] Its charge is to regulate horse racing for pari-mutuel wagering through licensing of racetracks, horse owners, trainers and the like and the promulgation and implementation of regulations and conditions for the operating of all racetracks in Louisiana.[3]

The law controlling horse racing in Louisiana is found in Title 4, Chapter 4 of the Louisiana Revised Statutes of which Part 1 contains the provisions for the licensing of a race meeting. Section 147 sets out the

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[1] A copy of the relevant state statutes has been reproduced for the Court's convenience and attached hereto as ***Appendix B***.

[2] ***Appendix B***, La. Rev. Stat. Ann. §§ 4:141 *et seq.*, 36:4(A) and 36:109.

[3] ***Appendix B***, La. Rev. Stat. Ann. §§ 4:147 and 4:148.

requirements to be included in an application, and Section 159 illustrates some of the criteria to be considered by the Racing Commission in determining whether to grant a license.

A person desiring to conduct horse racing in Louisiana where no racing was previously conducted must obtain approval from the parish in which the racetrack will be situated in a referendum election after application and approval by the Racing Commisson.[4]

After voter approval in a parish wide referendum election where the racetrack will be situated, a qualified applicant may apply to the Racing Commission for a one (1) year or ten (10) year license to conduct race meeting(s) which license sets forth the name of the licensee, the location of the racetrack and the dates of the race meet.[5]

2. Statement of Facts

On October 26, 1992, Livingston Downs Racing Association, Inc. applied to the Racing Commission for a license to conduct horse racing in Livingston Parish. Horse racing had not previously been conducted in Livingston Parish.

The application was considered by the Racing Commission at its meeting in December 1992. The application was approved over objection of other interested parties.[6]

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[4] ***Appendix B***, La. Rev. Stat. Ann. § 4:181.

[5] ***Appendix B***, La. Rev. Stat. Ann. § 4:158.

[6] Livingston Downs application came for hearing before the Racing Commission in December 1992.The Racing Commission conducted a hearing on the application at its December 1992 meeting. Livingston Downs made presentation

Following a favorable referendum election, Livingston Downs, through its promoter Al Ransome, returned to the Racing Commission at each meeting thereafter seeking approval for additional permits and licenses. These Commission meetings were held in January 1993, April 1993, May 1993, August 1993, December 1993 and January 1994.[7]

First, Livingston Downs made application for racing dates and a race meet under La. Rev. Stat. Ann. § 4:158. It did not, at the time of application, have a racetrack on which to conduct the meet. However, Mr. Ransome made a lengthy presentation to the Racing Commission in May 1993 citing the need to obtain dates in order to secure financing.[8]

The request for racing dates was approved.

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in support of the application. The application was opposed by: Jefferson Downs, Fair Grounds, Louisiana Downs, New Evangeline Downs and Delta Downs, four of whom were licensed as racetracks. These entities challenged the issuance of the license to Livingston Downs by suing the Racing Commission in district court. *Jefferson Downs v. Louisiana State Racing Commission*, No. 92-20961, Division "G", Civil District Court for the Parish of Orleans, State of Louisiana. The trial court found in favor of petitioners and vacated the license. The Racing Commission appealed the decision to the Louisiana Fourth Circuit Court of Appeal who reversed and reinstated the license granted to Livingston Downs. *Jefferson Downs Corporation, Inc. v. Louisiana State Racing Commission*, 637 So.2d 1279 (La.Ct.App. 4th Cir. 1994); see La.Rev.Stat. 49:964.

[7] ***Pet. Appendix M***, p. 38, Apr. '94 Trans., Racing Comm'n Meeting.

[8] ***Pet. Appendix M***, p. 39, Apr. '94 Trans., Racing Comm'n Meeting.

Livingston Downs did not then, nor has it since, begin construction of a racing oval, backside barns or grandstand area for a racetrack.

Still, Livingston Downs returned to the Racing Commission making application for off-track wagering.

After the enactment of La. Rev. Stat. § 4:149.2, the Racing Commission was permitted to allow racetracks licensed in Louisiana to accept wagers on races conducted at out-of-state tracks, "simulcast wagering".

The Racing Commission was subsequently authorized by La. Rev. Stat. Ann. § 4:211 *et seq.* to license off-track wagering facilities. An off-track wagering facility is a satellite betting parlor which stands alone from the racetrack and/or grandstand and accepts wagers on any or all races on which the licensed racetrack accepts wagers. However, under La. Rev. Stat. Ann. § 4:211(5) only a licensee operating a racetrack in 1986-1987 may apply for a license to operate an off-track wagering facility in Louisiana. Even still, a qualified licensee may not be licensed to conduct off-track wagering unless it conducts live horse racing not less than eighty (80) days within a twenty week period. La. Rev. Stat. Ann. § 4:214.1.

Livingston Downs did not qualify as a primary licensee for off-track wagering because it did not operate a racetrack in 1986-87. Even assuming it did, it did not have a racetrack to conduct live horse racing at the time of its application or receive simulcasting.

Livingston Downs' application for an off-track wagering license was, therefore, denied.

Eighteen months went by, but there was no racetrack in Livingston Parish. During this time though, Livingston

Downs contended that financing was imminent and construction was set to begin.[9]

The Racing Commission gave notice to Livingston Downs by certified letter to Mr. Ransome and two separate subpoenas that Livingston Downs' eligibility to retain its license in the face of its apparent difficulty to bring a racetrack to Livingston Parish would come for hearing on April 29, 1994 in New Orleans before the Commission.

During the April meeting, Livingston Downs disclosed numerous and apparently insurmountable obstacles which prevented its constructing and opening a racetrack in the foreseeable future, not the least of which was that Livingston Downs had still not acquired the land on which the track was to be situated:

> The title problems have – and we have prudently not purchased the property until all these problems are resolved.[10]

According to Livingston Downs' attorney, these title problems purportedly evolved from environmental concerns raised by potential investors because the proposed site was located across the street from a former solid waste facility closed by the EPA. Further complicating the issue, the property was owned by a succession one of whose heirs was in bankruptcy and the savings and loan which held the mortgage on the property was being

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[9] ***Pet. Appendix M***, pp. 70, 83, Apr. '94 Trans., Racing Comm'n Meeting.

[10] As spoken by Livingston Downs attorney. ***Pet Appendix M***, p. 47, Apr. '94 Trans., Racing Comm'n Meeting.

administered by the Resolution Trust Corporation (RTC).[11]

Considering the foregoing and other testimony and evidence presented during the hearing, the Racing Commission revoked the ten year license issued to Livingston Downs finding that it could not meet its obligations under the license.[12]

Still even as it was compelled to revoke the license, the Racing Commission did not foreclose the opportunity to Livingston Downs to own and operate a racetrack in Livingston Parish:

> Let it be understood, there is no doors closed to Mr. Ransome or anyone to apply for a license to run a racetrack before the Commission.[13]

Subsequent discussion by the Racing Commissioners reveal the Commission's continued commitment to licensing Livingston Downs when it was able to show the financial wherewithal to construct a racetrack and conduct a race meet.[14]

The hearing concluded when the attorney for Livingston Downs announced to the Racing Commission that a petition for trial de novo and suspensive appeal was already filed in district court for Livingston Parish

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[11] ***Pet. Appendix M***, p. 45, Apr. '94 Trans., Racing Comm'n Meeting.

[12] ***Pet. Appendix M***, p. 75, Apr. '94 Trans., Racing Comm'n Meeting.

[13] As spoken by Chairman of the Racing Commission, ***Pet. Appendix M***, p. 78, Apr. '94 Trans., Racing Comm'n Meeting.

[14] ***Pet. Appendix M***, pp. 78-81, Apr. '94 Trans., Racing Comm'n Meeting.

suspending the Racing Commission decision to revoke Livingston Downs' license.[15]

3. Procedural History

On April 29, 1994, Livingston Downs filed a petition for trial de novo and suspensive appeal in the Louisiana Twenty-first Judicial District Court for Livingston Parish under La. Rev. Stat. Ann. § 4:158 appealing the revocation of its license by the Racing Commission at its meeting in New Orleans on that day. The suit was thereafter transferred to Louisiana Civil District Court for the Parish of Orleans.[16]

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[15] ***Pet. Appendix M***, p. 84, Apr. '94 Trans., Racing Comm'n Meeting.

[16] The Racing Commission excepted to venue in Livingston Parish under La. Rev. Stat. Ann. § 4:145.1 which provides Civil District Court for the Parish of Orleans is the exclusive venue for suits against the Commission. The trial judge overruled the exception. The Commission appealed on writ application to the Louisiana First Circuit Court of Appeal. The writ was denied. *Livingston Downs Racing Ass'n v. La. State Racing Comm'n*, No. 94-CW-2229, 654 So.2d 1372 (La.Ct.App. 1st Cir. 2/24/95). The denial was appealed to the Louisiana Supreme Court who reversed the trial court and transferred the matter to Civil District Court citing La. Rev. Stat. Ann. § 4:145.1 but offering no other opinion. *Livingston Downs Racing Ass'n v. La. State Racing Comm'n*, No. 95-CC-0749, 655 So.2d 1340 (La. 4/28/95). Pursuant to the local rules of Civil District Court No. 7, the case was assigned to Division "G" and consolidated with *Jefferson Downs v. La. State Racing Comm'n*, No. 92-20961. Subsequently, the trial court dismissed the suspensive appeal. The Louisiana Fourth Circuit Court of Appeal reinstated the suspensive appeal by reversing the trial court and remanding it for further proceeding. ***Pet. Appendix J***, *Livingston Downs Racing Ass'n, Inc. v. La. State Racing Comm'n*, No. 96-C-1215, 675 So.2d 1214 (La.Ct.App. 4th Cir. 6/5/96).

After the petition was set for trial on the merits, the parties entered into a Consent Judgment on November 15, 1996. Under the terms of the Consent Judgment, the trial was continued without date, and the proceedings were stayed until October 31, 1998. Also, the license issued to Livingston Downs was suspended until that time pending satisfaction by Livingston Downs of certain terms and conditions outlined in the Consent Judgment, the most important of which was to obtain a commitment for or financing for the racetrack in Livingston Parish.

When Livingston Downs still could not secure financing for the track after the two additional years, a motion to dismiss the petition was filed pursuant to the terms of the Consent Judgment entered into between the parties.[17]

Livingston Downs appealed the dismissal to the Louisiana Fourth Circuit Court of Appeal. The court of appeal rendered an opinion affirming the trial court but echoed the Racing Commission that the decision does not foreclose a subsequent application by Livingston Downs.

An application for rehearing to the Fourth Circuit Court of Appeal *en banc* was summarily denied, and the Louisiana Supreme Court similarly denied Livingston Downs' writ application.

ARGUMENT

Livingston Downs comes before this Honorable Court complaining of "a state agency's blatant trampling

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[17] ***Pet. Appendix H,*** Consent Judgment.

of a private citizen's rights of due process and equal protection under the U.S. Constitution."[18]

Where is the trampling of due process and equal protection? Livingston Downs asked for a license to operate a racetrack; it was granted. Livingston Downs asked for racing dates; it was granted. Livingston Downs promised to build a racetrack. It did not.

Livingston Downs' rights of due process and equal protection have been exercised both at the administrative level before the Racing Commission and on judicial review to the court beyond a point of exhaustion and on the edge of abuse.

Livingston Downs' grievance cannot be that it has not been afforded all due process and equal protection. It has done nothing since first receiving its license but engage itself, the Racing Commission, individual Commissioners and others in extensive and exhaustive litigation.[19]

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[18] *Petition*, p. 2.

[19] A history, only in part, of some of the litigations filed and sustained by Livingston Downs over the past eight years: *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, La.M.D. 96-3430, still pending; *Livingston Downs v. La. State Racing Comm'n*, Louisiana Civil District Court Parish of Orleans State, No. 97-12435 for off-track wagering, petition dismissed and appealed to Louisiana Fourth Circuit Court of Appeal No. 98-1229, 727 So.2d 644 (1999); *Livingston Downs Racing Ass'n v. Louisiana*, Louisiana Nineteenth Judicial District Court for East Baton Rouge Parish, No. 399,563 petition for declaratory order, appealed to Louisiana First Circuit Court of Appeal, No. 94-1514, 653 So.2d 1311, *rev'd in part* 705 So.2d 149 (1997), *reh'g denied* (12/2/97); also appeal transferred to Louisiana First Circuit Court of Appeal by Louisiana Supreme Court, No. 96-2153, 678 So.2d 535 (1996); *Livingston Downs Racing Ass'n v.*

The Racing Commission's regulatory action, sustained by the Louisiana courts, is not the cause or source of Livingston Downs' inability to construct a racetrack. The inability is an independent financial reality wholly unrelated to the regulatory actions.

The Racing Commission issued a license to Livingston Downs in good faith and the expectation that Livingston Downs possessed the ability to open and operate a racetrack in Livingston Parish. The license was revoked when it became obvious that Livingston Downs' representations were mere aspirations.

Even still, the Racing Commission remained committed to Livingston Downs. And, the Racing Commission agreed to suspend Livingston Downs' license for two years under the terms of the Consent Judgment to allow it yet two additional years to secure adequate financing.

Louisiana, Louisiana Nineteenth Judicial District Court for East Baton Rouge Parish, No. 413,022 c/w 399,563, *Livingston Downs Racing Ass'n v. La. Racing Comm'n*, Louisiana Twenty-first Judicial District Court for Livingston Parish, No. 71, 137, appealed to Louisiana First Circuit Court of Appeal, No. 94-2229, 654 So.2d 1372, *writ denied* to Racing Commission, *writ granted* by Louisiana Supreme Court No. 95-0749, 655 So.2d 1340 (1995) case transferred, *reh'g not considered* No. 95-0749, 656 So.2d 1008 (1995); *Livingston Downs Racing Ass'n v. Krantz*, Louisiana Twenty-first Judicial District Court for Livingston Parish, No. 68,608, appealed to Louisiana First Circuit Court of Appeal No. 95-1217, 664 So.2d 103 (1995) suit dismissed, *writ denied* No. 95-1996, 665 So.2d 389 (1995); *Livingston Downs Racing Ass'n v. Committee to Control Gambling*, Louisiana Twenty-first Judicial District Court Livingston Parish, No. 68, 605 Div. "C", appealed to Louisiana First Circuit Court of App. No. 93-2136, 641 So.2d 2 (1994), appealed to Louisiana Supreme Court No. 94-0304, 633 So.2d 158 (1994).

Finally, the Louisiana Fourth Circuit Court of Appeal acknowledged, even after affirming the dismissal of Livingston Downs suit, that nothing precludes Livingston Downs from reapplying for a license, presumably assuming Livingston Downs secures financing.

Livingston Downs does not have a license issued by the Racing Commission to conduct horse racing in Louisiana because there is no racetrack, racing oval, backside barns or grandstand to conduct a race meet assuming it ever acquired the land on which the racetrack was to be built.

In all events, this cause does not present any important federal question to be decided because there is no federal question raised.

On appeal to the Supreme Court, petitioner does not complain that the due process provided under Louisiana state law is inadequate.

Livingston Downs does not complain that the due process available under state law has been applied unconstitutionally to Livingston Downs.

The complaint, plainly stated, is that the due process guarantees and equal protections afforded by state law were *not* applied correctly to Livingston Downs.[20]

The Louisiana Fourth Circuit Court of Appeal found that they were. The Louisiana Supreme Court did not consider otherwise.

Because the case does not present any federal question, this opposition will first consider Livingston Downs' plea for the court's jurisdiction under 28 U.S.C. § 1257.

Next, the opposition will present the merits of the decision based upon state law from which this appeal

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[20] ***Petition***, p. 14.

arises. The matter comes on application to the Supreme Court from a decision of the Louisiana Supreme Court to deny writ application to review a decision of the Louisiana Fourth Circuit Court of Appeal. The appeal court found in favor of the Racing Commission applying the plain provisions of the Consent Judgment entered into by Livingston Downs.

Finally, this opposition will address Livingston Downs' arguments of due process and equal protection relating to the initial revocation of its license notwithstanding a decision of the court that those issues were laid to rest by the Consent Judgment.

1. There Is No Federal Question At Issue Under 28 U.S.C. § 1257 To Convey Jurisdiction

Livingston Downs invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257.

28 U.S.C. § 1257 provides for review by the United States Supreme Court on *writ of certiorari* of the highest court of a State for any one of three reasons:

(1) the validity of a treaty or statute of the United States is drawn in question, or

(2) where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or

(3) where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Initially, a cursory review of petitioner's application reveals no grounds for invoking jurisdiction under 28 U.S.C. § 1257.

Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979), involved an action by a licensed horse trainer of the New York State Racing and Wagering Board challenging the constitutionality of a statute authorizing the summary suspension of his racing license without a pre-suspension hearing. Under the state statute, the trainer was entitled to a post-suspension hearing but there were no delays set by statute guaranteeing the hearing would take place promptly. The licensee did not attempt to avail himself of the procedures for a post-suspension hearing, but challenged the *inadequacy* of the remedy under the Fourteenth Amendment in federal district court. The Supreme Court upheld the constitutionality of the statute allowing for summary suspension of a horse trainer's license without a pre-suspension hearing, property interest notwithstanding, but found the suspension constitutionality infirm because there was no guarantee of a meaningful and prompt post-suspension hearing.

Unlike *Barry*, Livingston Downs does not challenge the due process and equal protection afforded by Louisiana but the results obtained.

Livingston Downs specifically acknowledges that the issue presented is "not whether the procedural safeguards put into place by the State of Louisiana to prevent governmental deprivation of property without due process of law are sufficient". Rather, Livingston Downs claims an error in the application or failure to apply procedural protections in place which are purely issues of state law.[21]

Further, there must be both a federal question raised and decided by the highest state court to review by the

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[21] ***Petition***, p. 14.

Supreme Court in the absence of which there is no jurisdiction. A point neither appealed nor decided is not properly before the Supreme Court.[22]

The Supreme Court has no supervisory jurisdiction over state courts and, in reviewing state court judgment, is confined to evaluating it in relation to the Federal Constitution.[23]

Livingston Downs has not, until now, objected to the revocation of its license or review by Louisiana state courts under the Fourteenth Amendment of the United States Constitution or under similar guarantees provided by the Louisiana Constitution, for that matter.

The cause comes before the Supreme Court from a state court judgment dismissing Livingston Downs' pending petition pursuant to the terms of a Consent Judgment entered into between the Racing Commission and Livingston Downs.[24]

Issues presented for review on appeal of this decision to the Louisiana Fourth Circuit Court of Appeal were restricted to the application and interpretation of state law, for example: (1) whether the Commission, as an administrative agency, is required to comply with the provisions of the Open Meeting Law; (2) whether the Commission's motion to dismiss is a violation of the Open Meeting Law; (3) whether the Commission, as an administrative agency, is required to comply with the

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[22] *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976).

[23] *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).

[24] ***Pet. Appendix H***, Judgment, Louisiana Civil District Court for the Parish of Orleans.

provisions of the Administrative Procedure Act; and (4) whether the Commission's motion to dismiss is a violation of the Administrative Procedure Act.[25]

On subsequent application of *writ of certiorari* to the Louisiana Supreme Court, Livingston Downs assigned thirteen different assignment of errors, two of which loosely claim that its due process rights were violated because the Louisiana Fourth Circuit Court of Appeal decided the case on an "incomplete" record. It never raises any issue of equal protection.[26]

These assignments of error, however, were premised upon the argument that the issue before the court was the attendant due process of the initial revocation of license.[27]

However, the original petition for trial de novo and for suspensive appeal did not allege the license was revoked without due process, but that the decision to revoke was made without "just cause" under La. Rev. Stat. Ann. § 4:160. This is a factual determination which was rendered moot when the parties entered into the Consent Judgment.

Furthermore, the decision of the Louisiana Fourth Circuit Court of Appeal rested upon an interpretation and enforcement under state law of the Consent Judgment.

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[25] ***Appendix C***, p. 11, Livingston Downs, Appellant Original Brief to Louisiana Fourth Circuit Court of Appeal.

[26] ***Appendix E***, p. 14, Livingston Downs, Petition for *Writ of Certiorari* to Louisiana Supreme Court.

[27] ***Appendix E***, Livingston Downs, Petition for *Writ of Certiorari* to Louisiana Supreme Court.

The Louisiana Supreme Court denied Livingston Downs' application to review the Louisiana Fourth Circuit Court of Appeal decision.[28]

Thus, even to the extent Livingston Downs ever alleged any Fourteenth Amendment claim, the case was decided and supported by the application of state law.

2. Louisiana State Court Properly Decided Case On Terms Of Consent Judgment

This opposition turns now to discuss the Louisiana Fourth Circuit Court of Appeal decision which the Louisiana Supreme Court declined to review on application of *writ of certiorari*.

The Louisiana Fourth Circuit Court held on appeal that the trial court was not clearly wrong in finding the conditional commitment for collateralized financing submitted by Livingston Downs did not comport with the requirements of the Consent Judgment, thus, requiring the case be dismissed.[29]

Livingston Downs petition for trial de novo and for suspensive appeal challenging the revocation of its license was set for trial in Louisiana Civil District Court for the Parish of Orleans when the parties entered into the Consent Judgment in November 1996.

Contrary to Livingston Downs Statement of Facts presented to the Supreme Court, the Racing Commission did not approach Livingston Downs to propose the Consent Judgment and certainly did not enter the Consent Judgment, as Livingston Downs represents, to secure a

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[28] ***Pet. Appendix K,*** *Writ denied,* Louisiana Supreme Court.

[29] ***Pet. Appendix D,*** Decision of the Louisiana Fourth Circuit Court of Appeal.

dismissal from Livingston Downs of an action brought in federal court against certain individual Commissioners.[30]

The Consent Judgment was only a part of a larger settlement agreement. The settlement provided that Livingston Downs dismiss its action in United States District Court for the Middle District of Louisiana against certain individual Commissioners. However, the settlement also provided that the Racing Commission would not pursue Livingston Downs for minimum license fees owed totaling $200,000.[31]

The Consent Judgment was intended to settle the pending petition for trial de novo appealing the revocation of Livingston Downs' license to operate a racetrack in Louisiana.

The Racing Commission had nothing to lose nor anything to gain by trying the petition on its merits. Conversely, Livingston Downs risked an adverse ruling on the merits which would have meant the loss of its license in 1997.

The Consent Judgment provided Livingston Downs two additional years within which to financially rehabilitate itself and cure any obstacles which prevented it from constructing and opening a racetrack under the license it possessed.

The terms of the Consent Judgment provide that **Livingston Downs Racing Association, Inc.** make application to the Racing Commission on or before October 31, 1998 which application shall include

> **"within the application binding, enforceable commitment letter(s), in an amount not less**

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[30] ***Petition***, p. 7.

[31] ***Appendix I***, Settlement.

than TEN MILLION ($10,000,000.00) DOLLARS,"[32]

Remedies defined under the Consent Judgment for each party were set forth in paragraphs 15 and 16 which read as follows:

> 15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, racing oval and backside, on the timetable as set forth hereinafter, then these proceedings shall be dismissed with prejudice at plaintiff's costs.
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> 16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

The Consent Judgment specifically reserved jurisdiction over the enforcement of the Consent Judgment to the trial court in Paragraph 18.[33]

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[32] ***Pet. Appendix N***, Consent Judgment.

[33] ***Pet. Appendix N***, Consent Judgment.

On November 1, 1998, the Racing Commission received an application from **Livingston Downs Racing Association, L.L.C.**, a new and different legal entity from the one specified in the license and Consent Judgment.

Attached to the application was a document entitled "Conditional Commitment for Collaterlized [sic] Mortgage" provided to Al J. Ransome. The document begins Livingston Downs Racing Association, Inc. "have submited a loan application in the aggregate amount of $10,000,000." The conditional commitment purportedly provided for financing in the "maximum principal amount of $10,000,000 Dollars" subject to and conditioned upon performance and/or satisfaction of additional terms, the performance and satisfaction of which was based on the "sole and absolute discretion of Remington Financial Group, Inc."[34]

Under Louisiana law, a suspensive condition that depends solely on the will of the obligor makes the obligation null. La.Civ.Cd. Article 1770.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. *Willowood Condominium Ass'n, Inc. v. HNC Realty Co.*, 531 F.2d 1249 (5th Cir. 1976). The *Willowood* court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. The court held that a letter setting forth terms upon which a loan to developers would be made subject to approval of a loan committee which failed to include essential elements of a loan was not an enforceable loan commitment. *Willowood*, 531 F.2d at 1252.

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[34] ***Appendix A***, "Conditional Commitment for Collaterlized [sic] Mortgage Financing."

The Conditional Commitment submitted by Livingston Downs was not a binding, enforceable commitment as required by the Consent Judgment but nothing more than a letter setting forth terms upon which a loan may be made. There is no funding date specified, or monthly payment set forth, or rate of interest, or commitment fee paid which is evidenced in writing. Further, it implies the need for substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors, whoever they may be.

The issue whether the Conditional Commitment and application satisfied the terms of the Consent Judgment was presented to the Louisiana Civil District Court for the Parish of Orleans by a motion to dismiss as anticipated in Paragraph 15 of the Consent Judgment.

The Motion to Dismiss and Memorandum in Support were filed on November 10, 1998. The motion was set for hearing on December 4, 1998. Livingston Downs was served under La.Civ.Code Pro. art. 1314 by the sheriff on counsel of record.[35]

Livingston Downs filed a memorandum in opposition to the motion to dismiss.[36]

The motion came for contradictory hearing on December 4, 1998. Following argument of counsel for the Racing Commission and Livingston Downs, the court concluded based upon the evidence presented that the application and conditional commitment submitted by Livingston Downs did not comply with the terms of the

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[35] ***Appendix G***, Memorandum In Support of Motion to Dismiss.

[36] ***Appendix H***, Memorandum In Opposition to Motion to Dismiss.

Consent Judgment and dismissed the case pursuant to paragraph 15 of the Consent Judgment.

The Louisiana Fourth Circuit Court of Appeal affirmed the trial court finding the following:

> "We note that the conditional commitment submitted by Livingston Downs provided for financing in the 'maximum amount of $10,000,000' rather than in 'an amount not less than' ten million dollars as required by the consent judgment. Also, the conditional commitment provided for ownership in the 'project' by unknown persons 'at the sole and absolute discretion of Remington Financial Group, Inc.' "[37]

Livingston Downs has never, and still does not, challenge the factual finding first made by the trial court that the conditional commitment for collateralized mortgage financing was *not* an "enforceable, binding commitment" per the terms of the Consent Judgment.

3. Due Process Afforded Livingston Downs

On appeal to the Louisiana Fourth Circuit Court of Appeal from the trial court's ruling, Livingston Downs raised that the motion to dismiss filed by the Racing Commission pursuant to the terms of the Consent Judgment represented an unlawful adjudication of its license which did not comply with the Louisiana Administrative Procedure Act and Open Meeting Law.[38]

Livingston Downs again raises these complaints to the Supreme Court. In response, this opposition looks

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[37] ***Pet. Appendix D***, p. 10, Decision of the Louisiana Fourth Circuit Court of Appeal.

[38] ***Appendix C***, p. 14, Livingston Downs, Appellant Original Brief to Louisiana Fourth Circuit Court of Appeal.

now at the due process afforded Livingston Downs through the provisions of the Louisiana Administrative Procedure Act and Open Meeting Law.

The Louisiana Open Meeting Law provides that every meeting of any public body shall be open to the public, and all votes by members shall be *viva voce* and recorded in the minutes of the meeting.[39]

The Racing Commission is comprised of nine members appointed by the Governor and confirmed by the state senate.[40] A meeting of the Racing Commission or congregation of five or more members for the purpose of discussing official business or to take action is governed by the Louisiana Open Meeting Law.

The Racing Commission's regulatory hearing, practices and procedures for suspending, withdrawing or revoking racing licenses and promulgating rules are as provided by the Louisiana Administrative Procedure Act.[41]

In any adjudication before the Racing Commission, all parties are afforded a hearing after reasonable notice. Every party adjudicated is further afforded opportunity to respond and present evidence on all issues of fact involved.[42]

Nothing, however, provided by the Administrative Procedure Act precludes an informal disposition of any adjudication by stipulation, agreed settlement, consent order, or default.[43]

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[39] ***Appendix B***, La. Rev. Stat. Ann. § 42:4 *et seq.*

[40] ***Appendix B***, La. Rev. Stat. Ann. § 4:144.

[41] ***Appendix B***, La. Rev. Stat. Ann. § 4:154.

[42] ***Appendix B***, La. Rev. Stat. Ann. § 49:955(C).

[43] ***Appendix B***, La. Rev. Stat. Ann. § 49:955(D).

Any person aggrieved by a decision of the Racing Commission is entitled to judicial review by filing a petition in the district court of the parish in which the agency is located within thirty days after mailing notice of the decision. The filing of the petition does not itself stay the decision, but the reviewing court may order a stay *ex parte*.[44]

Thereafter, either party may obtain further review on petition for appeal from the district court to the appellate courts.[45]

The Racing Commission is domiciled in the Orleans Parish, City of New Orleans. Louisiana Civil District Court for the Parish of Orleans is the court of proper venue to review any decision of the Racing Commission.[46]

a. Due Process Afforded Livingston Downs On License Revocation

Livingston Downs' eligibility to hold its license came for hearing before the Racing Commission after notice provided in accordance with the Administrative Procedure Act. It was given ample opportunity to present evidence regarding its eligibility to retain its license. The evidence Livingston Downs presented was that it did not, after eighteen months, so much as acquire the land on which the racetrack was to be situated. And further, Mr. Ransome, Livingston Downs' promoter, explained the following:

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[44] ***Appendix B***, La. Rev. Stat. Ann. § 49:964, *see also* La. Rev. Stat. Ann. § 4:158.

[45] ***Appendix B***, La. Rev. Stat. Ann. § 49:965.

[46] ***Appendix B***, La. Rev. Stat. Ann. § 145.1.

> "We are not trying to raise the money for the racetrack first. We are going to go ahead and get land done and then fight the battle because we will be having a thing."[47]

The "thing" is that Livingston Downs contended a racetrack is not a viable financial endeavor without off-track wagering.[48] But, the license granted to Livingston Downs by the Racing Commission was not predicated upon it having off-track wagering because the law did not allow for it.[49]

Livingston Downs was given notice and opportunity for a meaningful hearing before the Racing Commission under the Administrative Procedure Act, and the Racing Commission concluded upon the evidence presented that Livingston Downs' license should be revoked.

As further proof Livingston Downs was adequately provided due process, the Racing Commission was advised by Livingston Downs' attorney that a petition for trial de novo was filed within minutes of the Racing Commission's decision to revoke its license in a court eighty miles away enjoining the revocation because:

> "As you can tell, we fully expected the vote that happened today."[50]

Livingston Downs did not allege that its license was revoked by the Racing Commission without due process.

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[47] As spoken by Livingston Downs promoter/owner, ***Pet. Appendix M***, p. 70, Apr. '94 Trans., Racing Comm'n Meeting.

[48] As spoken by Livingston Downs' attorney, ***Pet. Appendix M***, p. 15, Apr. '94 Trans., Racing Comm'n Meeting.

[49] *Jefferson Downs v. La. Racing Comm'n*, 637 So.2d 1279 (La.Ct.App. 4th Cir. 1994).

[50] As spoken by Livingston Downs' attorney, ***Pet. Appendix M***, p. 84, Apr. '94 Trans., Racing Comm'n. Meeting.

Rather, it alleged that its license was revoked without "just cause".[51] However, the "just cause" for revoking its license was supported by *the evidence Livingston Downs presented* to the Racing Commission that a racetrack in Livingston Parish was not presently financially feasible.

Subsequently, Livingston Downs challenged the constitutionality of the law which precluded it from obtaining an off-track wagering license.

The suit challenging the constitutionality was still pending when Livingston Downs and the Racing Commission agreed to enter into the Consent Judgment.

The Consent Judgment came for approval before the Racing Commission at a meeting in November 1996 convened in accordance with the Open Meeting Law. The Consent Judgment was approved on the record in open meeting.

In December 1997, the Louisiana Supreme Court ruled to uphold the constitutionality of the state statute which precluded Livingston Downs from ever obtaining an off-track wagering license. This decision is now final.[52]

Livingston Downs then argued that the Consent Judgment did not settle issues raised by the petition.[53]

What would be the purpose to the consent judgment, any consent judgment, if it were not to finally resolve the dispute? If the purpose was to do nothing more than afford Livingston Downs two additional years there

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[51] ***Pet. Appendix L***, Petition for Trial De Novo.

[52] *Livingston Downs Racing Ass'n v. Louisiana*, 705 So.2d 149 (La. 1997), *reh'g denied*.

[53] ***Appendix C***, p. 13, Livingston Downs, Appellant Original Brief to the Louisiana Fourth Circuit Court of Appeal.

would have been no need for a *Judgment* or for that matter a revocation.

The Louisiana Fourth Circuit Court of Appeal found no merit in Livingston Downs' argument and rested its decision upon the terms of the Consent Judgment. More particularly, it found that the Racing Commission complied with the Administrative Procedure Act and Open Meeting Law when it approved the Consent Judgment, but that thereafter jurisdiction over the Consent Judgment was reserved to the trial court.[54]

Livingston Downs has never contended that the Consent Judgment itself is unenforceable because the Racing Commission did not comply with the Open Meeting Law or Administrative Procedure Act in its approval. Certainly, Livingston Downs has availed itself of all benefits afforded Livingston Downs under the Consent Judgment.

b. Due Process Afforded Livingston Downs On Judicial Review

Lastly, Livingston Downs presents its due process rights were violated on judicial review at both the trial and appellate levels.

The violation, it contends, at the trial level occurred because it was denied an opportunity to be heard. This is simply untrue. The hearing was necessarily based on the implementation and enforcement of the Consent Judgment. Livingston Downs was represented at the hearing by its counsel, who argued before the district judge.

It did not, because it could not, supply evidence that its commitment was for "not less than TEN MILLION

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[54] ***Pet. Appendix D***, Decision of the Louisiana Fourth Circuit Court of Appeal.

($10,000,000) DOLLARS" instead of not to exceed Ten Million Dollars.

Livingston Downs had the benefits of a contradictory hearing. It simply could not benefit from such a hearing because of the undisputed facts.

Insofar as it alleges that its rights were violated on appeal due to an "incomplete" record, it suffices to note that Livingston Downs has never particularlized or specified just what would be established by the "missing" pleadings or transcripts. Listed at ***Pet. Appendix E*** and ***F***, there is no explanation or analysis or support of how their consideration would have changed the results.

Moreover, Livingston Downs did not consider the certified record on appeal so important that it verified its correctness before filing its brief to the court. Rather, it was counsel for the Racing Commission who brought to the court's attention that particular documents *necessary* to the appeal were not properly before the court.[55] These documents were, nevertheless, attached to both appellant's and appellee's brief.

4. Equal Protection to Livingston Downs

Lastly, Livingston Downs argues that its rights of equal protection were violated by the revocation of its license by the Racing Commission.

Before this application, Livingston Downs never raised the issue that the revocation of its license by the Racing Commission violated its right to equal protection under the law. It did not plead it in its original petition

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[55] ***Appendix F***, Louisiana Racing Commission, Respondent Original Opposition to Application on *Writ of Certiorari* to Louisiana Supreme Court.

for trial de novo and suspensive appeal.[56] It did not argue it to the Louisiana Fourth Circuit Court of Appeal following the dismssal of the action.[57] It did not argue it to the Louisiana Supreme Court on application of *writ of certiorari* to review the Louisiana Fourth Cirucit Court of appeal, which application was denied.[58] Therefore, it is not properly before this court for consideration.

Now for the first time, Livingston Downs argues that the revocation of its license under La. Rev. Stat. Ann. § 4:160 violated its right of equal protection because the Racing Commission did not promulgate rules to guide application of La. Rev. Stat. Ann. § 4:160.

Assuming *arguendo* equal protection was ever at issue, the issue was laid to rest when Livingston Downs entered the Consent Agreement. The Consent Judgment established the standard and stipulated that the financial suitability necessary for Livingston Downs to maintain its eligibility to hold the license necessitated a commitment of not less than Ten Million Dollars. Livingston Downs accepted that standard and the Racing Commission agreed to the standard when each party entered the Consent Judgment. If Livingston Downs did not secure the requisite financing it was "just cause" under the Consent Judgment to have the litigation challenging the revocation of the license dismissed.

Further, the Racing Commission is not required to promulgate rules for the application of every state statute but rather for the conduct of racing not provided by statute. The Racing Commission has established extensive

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[56] ***Pet. Appendix L.***

[57] ***Appendix C.***

[58] ***Appendix E.***

Rules of Racing governing the conduct of racing and maintenance of racetracks which are reported in the Louisiana Administrative Code. The standard for revoking an association license to operate a racetrack is sufficiently perscribed by La. Rev. Stat. § 4:160.

If Livingston Downs seriously believed that its license could be maintained irrespective of the financial ability to bring racetrack into existence and believed that any other association did so in the past, it would have raised the issue properly before now.

CONCLUSION

This case comes on a petition for a *writ of certiorari* from a state court decision finding that Livingston Downs failed to satisfy the terms and conditions of a Consent Judgment which it entered into in November 1996.

The cause before the Court does not present any important federal issue which merits the Court's attention, but by petitioner's own statement, turns solely upon the application of state law.

Livingston Downs has had all the benefits of due process and equal protection under the law to which it is entitled, and then some. It has been given every opportunity by the Racing Commission affordable.

If Livingston Downs had the financial wherewithal to construct and open a racetrack in Livingston Parish, there would be a racetrack in Livingston Parish. According to Livingston Downs, a racetrack is not a viable financial endeavor in the current climate.

The Racing Commission's regulatory actions, nor those decisions by Louisiana courts on review, are the cause or source for Livingston Downs' grievance.

For these reasons, the Louisiana State Racing Commission respectfully opposes petitioner, Livingston Downs, application for *writ of certiorari*.

Respectfully submitted,

KIM RAINES CHATELAIN (#21525)
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(504) 483-4000
Counsel of Record for the Racing Commission

APPENDIX A

(LOGO) *REMINGTON FINANCIAL GROUP, INC.*

Two Bala Plaza • Suite 300
Bala Cynwyd, PA 19004
(610) 660-7793
TEL (215) 887-9822 *FAX (215) 887-9628*

October 28, 1998

Applicant: Mr. Al J Ransome
Livingston Downs Racing Association, Inc.
5353 Florida Blvd
Baton Rouge, LA 70821

RE: Initial financing of the LDRA race track and multi profit center complex

CONDITIONAL COMMITMENT FOR COLLATERLIZED [sic] MORTGAGE FINANCING

Livingston Downs Racing Association, Inc. (herein referred to as "Borrower") have submitted a loan application for financing in the aggregate principal amount of $10,000,000 to be collaterlized [sic] by the land and all building and improvements thereon, said 264.6 acre tract more fully described in on [sic] Schedule "A" (herein referred to as "Collateral") attached hereto and made a part hereof.

In support of this loan request, the Borrower has submitted, or will submit, certain financial data and supporting documentation listed and described on schedule "B" attached hereto and made a part hereof.

Subject to and conditioned upon performance and/or satisfaction of the terms, provisions, and conditions of

this Loan Commitment, which performance and/or satisfaction will be based on the sole and absolute discretion of Remington Financial Group, Inc., a Pennsylvania corporation, or our affiliates, participants and assigns (herein collectively referred to as "Lender"), and conditioned and in reliance upon certain representations and warranties made by the Borrower and its authorized representatives, Borrower shall receive financing in the maximum principal amount of $10,000,000

The terms, provisions and conditions of this Loan Commitment are as follows:

1. The loan amount ("Loan") will be in the principal amount of $10,000,000. Said loan amount shall not exceed 80% of subject property's Fair Market Value.

2. There shall be aggregate Loan placement, processing and origination fees on the entire amount of the Loan, payable to the Lender, in the amount equal to 2% of the gross Loan amount. This amount is payable in the same proportions as the Loan is funded.

3. If Borrower has agreed to pay brokerage fees in accordance with a separate agreement, Borrower may pay such fees from Loan proceeds.

4. The interest rate on mortgage Loan shall be the prime rate (currently 8.0%) plus 2% points, per annum. Interest may accrue. Interest rate is adjustable on a quarterly basis.

5. This mortgage and [sic] shall be due and payable in full 60 months following the date of closing of the Loan. Lender shall provide option to extend for 1 additional year at its sole discretion. There shall be no prepayment penalty.

6. The Loan shall be funded on or before [To be determined]. Funding is conditioned upon Lender receiving from Borrower all information and data specified herein and on the attached Schedules and also upon Borrower making all deposits and paying all fees specified herein and being in compliance with all other terms and conditions herein. Further, closing shall commence as quickly as (30) days after all general conditions and the specified conditions contained herein are met.

7. A description of the Collateral securing the Loan is set forth on Schedule "A" attached hereto. Lender, at its sole option, may subordinate to senior financing as it may become available to or benefit the Project. In this case, Lender shall maintain clear Second Mortgage. Borrower shall also pledge 100% of available stock of Borrowing entity until all principal and interest is repaid.

8. 15% of net cash flow, profit participation and ownership of the project shall go to RFG, which interest shall begin upon principal and interest repayment, provided said participation generates a 25% minimum annual I.R.R.

9. Prior to closing, the Borrower, shall be required to meet the following conditions:

a. Borrower must provide proof of the receipt of a 10 year license to conduct race meetings issued to LDRA by the Louisiana State Racing Commission. The license must be issued to a LLC.

b. Borrower must provide, if required, environmental and wetlands clearances.

c. Borrower must provide proof that the result of the January 16, 1993 election are final and that no further challenges or action will be bought [sic].

10. Borrower agrees to endorse or furnish all other documents, contracts, collateral, agreements, affidavits or materials which may be requested by RFG prior to, contemporaneous with, or subsequent to settlement of this Loan which may be deemed as necessary by RFG to protect its interest in the Loan and/or collateral.

11. Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at any time thereafter.

12. This Loan Commitment shall not be valid unless accompanied by a Loan Commitment fee in the amount of $N/A payable in accordance with the provisions contained herein.

13. The loan will be evidenced by a collaterlized [sic] promissory note (the "Note"), executed and endorsed by Borrower, as well as by any other person or entity with a title or beneficial interest in any of the Collateral securing this Loan, to the extent of such interest.

14. At and in all events, this Loan Commitment is subject to Lender's approval, in its sole and absolute discretion, of a current appraisal (or, at Lender's option, a confirming appraisal) of the Collateral.

15. At the date of settlement of this Loan, Borrower shall furnish Lender with paid receipt for fire insurance and extended liability insurance policy(s) covering the Collateral. Insurance coverage shall be in such amounts as are acceptable to Lender. Such insurance

policy's shall designate Lender as "Loss Payee" as its interest shall appear.

16. Real estate taxes, water and utility assessments, and any other assessments relating to the Collateral, must all be current or brought to a current status as of the date of settlement of this Loan. All such ownership costs must be kept in a current status throughout the term of this Loan. Such obligations shall remain current at all times or this Loan may be declared in default by Lender.

17. Prior to settlement of this Loan, Borrower shall furnish Lender with title insurance policy(s) on the Collateral acceptable to Lender, in its sole discretion. Such policy(s) shall name Lender as an insured mortgagee relative to the property(s) as its interest shall appear. Borrower shall also furnish to Lender with paid receipt(s) for fire insurance and extended liability insurance policy(s) covering the Collateral.

18. Borrower shall be responsible for, and shall pay all title company charges, reasonable attorney's fees, recording fees, document preparation charges and other third party fees required and incurred by Borrower and Lender in connection with the processing and settlement of this Loan.

19. Lender shall receive all assurances which Lender, in its sole discretion, determines are necessary and appropriate [sic] the Collateral meets or exceeds all Federal, State, County and or City environmental standards.

20. Prior to settlement of this Loan, Borrower will furnish Lender with authentic copies of any and all licenses, permits, bonds, approval, and authorizations as may be required in connection with the Project, its ownership and operation as determined by Lender in their sole opinion.

21. Borrower agrees to endorse or furnish any other documents, contracts, collateral, agreements, affidavits or materials which may be requested by Lender prior to, contemporaneous with, or subsequent to settlement of the Loan, which may be deemed necessary in its sole discretion to protect Lender's interest in the Loan and/or the Collateral.

22. Borrower will sign an affidavit at closing of this Loan stating the proceeds of this Loan will be used exclusively for the purposes stated on Schedule "C" to become part of Loan commitment.

23. This Loan commitment is contingent on Borrower having the capability, in the sole discretion of Lender, of servicing and repaying of Loan in accordance with its terms.

24. Lender, at its option may obtain credit information and accompanying data in the form of a credit report relative to borrower, and Borrower gives consent as to this provision.

25. There shall be a late fee charged during the period of the mortgage term in the amount of 5% of the monthly instalment [sic] amount on payments not received within 10 days of its due-date.

26. At and in all events, this Loan commitment is subject to Lender's approval in its sole discretion of all necessary documentation relating to Borrower, Project and Collateral.

27. This Loan Commitment shall not be valid unless accompanied by a Loan Commitment fee in the amount of $ N/A. This signed Loan commitment must be accompanied by payment of the aforementioned fee made payable to Remington Financial Group, Inc. This sum will be credited to against the Loan placement, processing, and origination fee

referred to in Paragraph 2, above. Said non-refundable fee represents payment for expenses incurred and efforts rendered by Lender with respect to investigations, inspections, verifications, confirmations, analyses and other services relative to Borrower, Project, and Collateral offered in support of this Loan.

28. This Loan commitment is conditioned upon acceptance of and compliance with the terms and conditions of this Loan commitment. Compliance shall be determined in the sole and absolute discretion of Lender. Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at anytime thereafter.

29. This Loan Commitment is contingent upon its compliance as presently structured with all applicable Pennsylvania rules, regulations and statutes relative to commercial/investment financing transactions.

30. This Loan Commitment is not valid unless a copy of such Commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998.

ACCEPTED BY BORROWER:

Livingston Downs Racing Association, LLC

By: /s/ Al J. Ransome 10/30/98
[date of acceptance]

ACCEPTED BY:

Remington Financial Group, Inc.

By: /s/ M. McManus 10/30/98
Matthew E. McManus [date of acceptance]

APPENDIX B

Appendix B reproduces, only in pertinent part, certain Louisiana statutes which are relevant to the petition for writ application before the court.

Included are pertinent parts of the following Louisiana Revised Statutes:

(1) Title 4, Chapter 4 related to Horse Racing;

(2) Title 36, Organization of the Executive Branch;

(3) Title 42, Public Officers and Employees, the "Open Meeting Law;"

(3) Title 49, State Administration, the "Louisiana Administrative Procedure Act."

LOUISIANA REVISED STATUTES
TITLE 4. AMUSEMENTS AND SPORTS
CHAPTER 4. RACING
PART I. HORSE RACING

§ 141. Legislative intent and policy

A. It is the policy of the state of Louisiana in furtherance of its responsibility to provide revenues for the operation of state government for its people, to acknowledge and declare that the providing of funds and financial assistance to licensed horse racing tracks in the state of Louisiana constitutes an authorized public function and purpose of the state of Louisiana, to encourage forceful and honest statewide control of horse racing for the public health, safety, and welfare by safeguarding the people of this state against corrupt, incompetent, dishonest and unprincipled horse racing practices;

(1) To institute and maintain a program to encourage and permit development of the business of horse racing with pari-mutuel wagering thereon on a high plane.

(2) To institute and maintain a program to encourage and permit development of the breeding and ownership of race horses in the state.

(3) To institute and maintain a regulatory program for the business of racing horses, which program assures the protection of public health, safety and welfare, vesting with the commission forceful statewide control of horse racing with full powers to prescribe rules and regulations and conditions under which all horse racing is conducted with wagering upon the result thereof with the state.

(4) To institute and maintain a program to provide financial assistance that will encourage and permit the development of the business of horse racing by licensed horse racing tracks in the state of Louisiana.

(5) To institute and provide a program for the regulation, ownership, possession, licensing, keeping, and inoculation of animals on premises under its control and supervision not inconsistent with the rules and regulations of the state livestock and sanitary board.

B. This Chapter is an exercise of the police powers of the state to promote the public health, safety and welfare.

§ 144. State Racing Commission; creation; membership; tenure; powers and duties; quorum; qualification of members; per diem; expenses and disbursements; bond

A. There is hereby created in the executive branch of state government a racing commission, to be known as the "Louisiana State Racing Commission". The commission shall have the powers and duties specified in this Part and all other powers necessary and proper to enable it to execute fully and effectually all of the objects, purposes, duties, and policies of this Part. It shall be composed of ten persons appointed by the governor, one appointed from each congressional district and two appointed at large. Each appointment by the governor shall be submitted to the Senate for confirmation. The governor shall select one member of the commission to serve as chairman. The commission shall select from among its membership a vice chairman and a second vice chairman for two year terms. Each member shall serve at the pleasure of the governor. A majority of the members shall constitute a quorum for the transaction of any business or the exercise of any power.

§ 145.1. Exclusive venue for law suits against the commission

The commission may be sued only in the city of New Orleans, parish of Orleans.

§ 148. Rules, regulations and conditions

The commission shall make rules, regulations and conditions for the holding, conducting and operating of all race tracks, race meets and races held in this state and

for the conduct of the racing industry of this state under this Part. Special rules, regulations and conditions may be promulgated separately for thoroughbred racing and for quarter horse racing. Said rules, regulations and conditions shall be consistent with this Part and provide for and deal with all matters necessary to the holding of such race meetings.

§ 149. Wagering; rules and regulations

The commission may prescribe rules and regulations under which shall be conducted all horse races upon the results of which there is wagering. The commission shall, as may be necessary, prescribe additional special rules and regulations applicable separately to thoroughbreds and quarter horses. The commission shall make rules governing, permitting, and regulating the wagering on horse races under the form of mutuel wagering by patrons, known as pari-mutuel wagering. Only those persons receiving a license from the commission may conduct this type of wagering, and shall restrict this form of wagering to a space within the race meeting grounds. All other forms of wagering on the result of horse races are illegal, and all wagering on horse races outside the enclosure where horse races have been licensed by the commission is illegal.

§ 149.2. Other track wagering

A. The commission may make rules regulating pari-mutuel wagering known as other track wagering.

B. (1) With the consent of the commission, an association may accept wagers at its facility for the entire racing card scheduled on horse racing events of regional, national, and international interest conducted at another track outside of this state, and transmitted either by simulcast or other means of video transmission, pursuant to a contract with the association or other entity conducting the event.

(2) After payment of license fees and commissions to the secretary as required by this Part and payment of the contract amount to the association or other entity transmitting the event, the remaining proceeds shall be retained by the licensee, fifty percent of which shall be distributed by such track licensee as purses.

C. (1) With the consent of the commission, an association conducting horse racing events at a track in this state may, by contract, authorize an association elsewhere in this state at their racing facilities, or any entity outside of this state, at its facilities, including legal nonracing facilities outside of this state, to accept wagers on such events.

(2) After payment of license fees and commissions to the secretary, if required by this Part, the amount of fees collected from any entity outside of this state at its facilities, including legal nonracing facilities outside of this state, shall be retained by the licensee, fifty percent of which shall be distributed by such track licensee as purses.

D. All contracts pursuant to this Section shall comply with all applicable laws of the United States, including 15 U.S.C. §§ 3001, et seq., and shall be entered into

only with entities operating racetracks permitted by applicable law to conduct horse racing and wagering thereon.

§ 149.3. Interstate wagering; common pools

A. Subject to applicable federal laws, including but not limited to the Interstate Horseracing Act of 1978 (Chapter 57, commencing with Section 3001, of Title 15 of the United States Code) the commission may permit a licensee to participate in interstate common pools, including common pools which may include international jurisdictions. All provisions of law governing pari-mutuel betting apply to pari-mutuel betting in interstate common pools except as otherwise provided in this Section or in the commission's rules.

B. Participation in a common pool solely as a track conducting the race or as a receiving track will not cause such track to be deemed to be doing business in this state, or in the other state, for any purpose.

C. With the prior approval of the commission, a licensee who is permitted to accept wagers in this state on horse races conducted at tracks conducting races located outside of this state may combine pari-mutuel pools in this state with comparable pools at the track conducting the race.

D. Notwithstanding other provisions of this Chapter and subject to the approval of the commission, the types of wagering, takeout, distribution of winnings, and rules of racing in effect for pari-mutuel pools at the track conducting the race shall govern wagers placed in this

state and merged into the interstate common pool. Breakage for interstate common pools shall be calculated in accordance with the law or rules governing the track conducting the race, and shall be distributed between participating jurisdictions in a manner agreed to between the licensee and the track conducting the race.

E. With the prior approval of the commission and with the concurrence of the track conducting the race, an interstate common pool may be formed among the licensee and other receiving persons or entities in any states other than the state in which the track conducting the race is located. For such an interstate common pool, the commission may approve the types of wagering, takeout, distribution of winnings, rules of racing, and calculation of breakage which are different than those which would otherwise be applied in this state but are consistent for all parties to the interstate common pool.

F. The licensee may deduct from wagers placed in any interstate common pool any fee to the person or entity conducting the race for the privilege of conducting pari-mutuel wagering on the race, and payment of costs incurred in transmitting the broadcast of the race and participation in the interstate common pool.

G. The provisions of law or contract, if any, governing the distribution of shares of the takeout, from wagers placed in this state in separate pari-mutuel pools on races run in another state, to this state as pari-mutuel taxes, or respectively to breeder awards and to purses in this state, shall remain in effect for wagers placed in interstate common pools; provided that if the commission has

approved an adjustment in the takeout rate, the distribution of the takeout within this state shall be adjusted proportionately to reflect the adjustment in the takeout rate; provided further that with the concurrence of the licensee, the share designated for purses may be modified.

H. With the prior approval of the commission, a licensee may permit one or more of its races to be utilized for pari-mutuel wagering at one or more locations in other states, may transmit audio/visual signals of races the licensee conducts to one or more locations outside the state, and may also permit pari-mutuel pools in other states to be combined with its comparable wagering pools or with wagering pools established by other states. The commission may modify its rules and may adopt separate rules governing interstate common pools, and may establish by rule separate provisions for interstate common pools governing the calculation of breakage.

I. Pari-mutuel taxes shall not be imposed upon any amounts wagered in an interstate common pool other than upon amounts wagered within this state.

J. The provisions of law or contract, if any, governing the distribution of shares of the takeout, from wagers placed in other states in separate pari-mutuel pools on races run in this state, respectively to breeder awards and to purses in this state, shall remain in effect for wagers placed in interstate common pools. Provided that with the concurrence of the licensee and the Horsemen's Benevolent and Protective Association, and the appropriate breeder's organization, the share of breeder awards or purses may be modified.

§ 154. Administrative procedure; appeal to the commission and review of commission rulings

A. Except as otherwise provided by this Section, the commission's hearings, practice and procedure, and rule making procedure are as provided in the Administrative Procedure Act; however, in cases made the subject of judicial review, the court may not extend or continue beyond ten (10) days from date of issuance any stay order or temporary restraining order issued by it, except:

(1) Upon agreement of counsel for all parties, or

(2) Absent such agreement, by order of the court, but only after a contradictory hearing held no later than the tenth (10th) day following the issuance of such stay order or temporary restraining order and then only upon a showing by a party that a denial of such extension or continuation would be prejudicial to that party's opportunity to cause the court to affirm, modify, or reverse the decision appealed from or to be reviewed.

B. A final appeal, in the case of any person penalized, or disciplined by the stewards, may be taken to the commission.

C. Such an appeal must be filed in writing at the office of the commission within five days of the date of said penalty or imposition of said discipline.

D. Such an appeal must be signed by the person making it and must set forth his reason therefor.

E. An appeal from the decision of the stewards to the commission shall not affect such decision until the appeal has been acted upon by the commission.

F. The commission must grant a hearing within ten days of the receipt of this appeal, and must render a decision within forty-eight hours following the conclusion of the appeal hearing. Any continuance of a hearing must be reasonable in duration and for just cause.

§ 158. License or permit to conduct race meetings, one-year and ten-year licenses

A. On or before the fifteenth of April of each year and on or before the fifteenth of August of each year any person possessing the qualifications prescribed in this Part may apply to the commission for a license to conduct race meetings. On or before the first of May and the first of September of each year, after receipt of the applications the commission shall convene to consider the refusal or granting of the permits or licenses applied for. An application filed prior to any one of the two deadlines shall request dates for racing to commence not sooner than four months from said deadlines. The permits or licenses granted shall set forth the name of the licensee, the location of the race track, the duration of the race meeting, and the kind of racing desired to be conducted, and shall recite the receipt by the commission of the license fee provided for in this Part. The license is not transferable nor does it apply to any place, track, or enclosure except the one specified in the license. Should the commission, after due proceedings had in conformity with this Part, suspend or revoke an association's license or terminate the racing privileges granted to an association, said association may within ten days of the notification of the commission's decision take a suspensive appeal to the district court having jurisdiction over the

association's track. Such appeals shall be filed in the district court in the same manner as original suits are instituted therein. The appeals should be tried de novo. Either party may amend and supplement his pleadings and additional witnesses may be called and heard.

Within ten calendar days of the signing of the judgment by the district court in any such appeal case, the commission or the applicant for a license or licensee, as the case may be, may suspensively appeal the judgment to the appellate court of proper jurisdiction. These appeals shall be perfected in the manner provided for in civil cases and shall be suspensive or devolutive in the discretion of the court.

All proceedings in the district and appellate courts arising under this Part are civil in nature and shall be heard summarily by the court, without a jury, shall take precedence over other civil cases, and shall be tried in chambers or in open court, and in or out of term.

B. The provisions of this Part to the contrary, notwithstanding, the commission may contract with any licensee for a permit to operate a track for a period of ten years. Such permit shall conform to all the requirements as set out in Subsection (A) of this section; however, any licensee applying for a ten-year license under this section shall also agree in writing to expend the sum of no less than $10,000.00 per year or $100,000.00 during said ten-year period for the purpose of repairs and improvements to the track and its facilities, said sum to be expended during said ten-year period.

The commission may approve an application for racing dates for a period not exceeding three racing years,

when a contract has been entered into in accordance with this section.

§ 159. Criteria for licensing associations

In the exercise of its authority in considering the granting or denying of an association's application for a license or permit to conduct racing the following criteria, standards and guides by way of illustrations without limitation should be considered by the commission.

(1) The public interest.

(2) The location of the track.

(3) The number of tracks running or making application.

(4) The adequacy of facilities of the track.

(5) The racing experience of the applicant.

(6) The moral and financial qualification of the applicant.

(7) The moral and financial qualifications of applicant's partners, officers and officials.

(8) The official attitude of local government involved.

(9) The nature of the local community affected.

(10) The expected effect upon the breeding and horse industry of this state.

(11) The expected effect upon the State's economy.

(12) The apparent or nonapparent hope of financial success.

(13) The official attitude of horsemen.

§ 160. Grounds for denial or termination of racing privileges to an association

The commission may refuse, suspend, or withdraw licenses, permits and privileges granted by it or terminate racing privileges, for just cause. Those things constituting just cause are:

(1) Any actions by a licensee or permittee contrary to the provisions of this Part and the Rules of Racing.

(2) Corrupt practice.

(3) Violations of the Rules of Racing.

(4) Intentional falsification and/or intentional misstatement of a material fact in an application for racing privileges.

(5) Material false statement to a racing official (other than a Commissioner) and/or the commission.

(6) Continued failure or inability to meet its financial obligations connected with fulfillment of the purposes for which its license was issued.

§ 181. Parish-wide election on horse racing meet

A. Notwithstanding any provision of law to the contrary, no horse racing meet in a parish in which no racing meet is being conducted on the effective date of this section, or in which no racing meet under a license

from the Louisiana State Racing Commission has been conducted prior to such effective date, shall be allowed where pari-mutuel betting is authorized by law unless the operation and conduct of the racing meet first has been approved at an election held in accordance with the provisions of this section; however, said election shall not be required prior to conducting quarter horse racing in St. Landry, Iberville, West Baton Rouge, Pointe Coupee and St. Martin Parishes.

B. Any person desiring to operate and conduct a horse racing meet in a parish in which no racing meet is being conducted on the effective date of this section, or in which no racing meet under a license issued by the State Racing Commission has been conducted prior to such effective date, shall make application to the governing authority of the parish in which the proposed horse racing meet is to be conducted. The application shall state the location of the proposed horse racing meet and describe the facilities proposed to be constructed for the holding of the racing meet and shall have attached the license, or a certified copy thereof, for the meeting issued to the applicant by the State Racing Commission.

C. Upon receipt of the application the governing authority of the parish in which the racing meet is proposed to be held shall call and conduct a referendum election within the parish for the purpose of submitting to the qualified electors of the parish the proposition whether or not the proposed racing meeting shall be allowed.

D. The referendum election shall be held on a date fixed by the parish governing authority within a period

of thirty days of receipt of the application. Notice of the election shall be published at least twice at five day intervals in the official journal of the parish or if the official journal is not published daily, then publication shall be in a daily newspaper of general circulation in the parish. The publication shall be completed at least five days prior to the date on which the election is to be held. The parish governing authority also shall have five spot announcements at least two days apart of the election broadcast on radio or television channels readily receivable in the parish and shall make notice of the election available to the news media. All qualified electors of the parish shall be entitled to vote in the election.

E. The proposition to be printed on the election ballot shall be: "Shall the business of horse racing be conducted within the parish of ___" and the voters shall vote for or against the proposition, a vote for the proposition being a "Yes" vote and a vote against the proposition being a "No" vote. The election shall be by secret ballot and conducted as nearly as possible in accordance with the general election laws of the state. Voting machines may be used and if used, the proposition to be submitted shall be shown on the machine ballot. Any elector who was qualified to vote in the election may demand a recount of the ballots or contest the election in the manner and within the time provided by law for recount or contest of elections under the general election laws of the state. The parish board of election supervisors shall supervise the election. It shall appoint three commissioners and one clerk, who shall be qualified electors and residents of the precinct, to preside over the election at each polling precinct. To reduce expenses of holding the

election, the governing authority of the parish may combine regular voting precincts provided notice of any such combination is included in the notice of the election. The governing authority of the parish shall promulgate the results of the election. For the proposition to carry, it must receive a majority vote in favor thereof of the votes cast in the election.

F. The parish governing authority shall notify the applicant and the State Racing Commission promptly of the results of the election. If the racing meet has been approved, the applicant may proceed with the racing meet in accordance with the license and rules and regulations of the State Racing Commission. If the proposed racing meet has not been approved at the election, the commission shall revoke the license theretofore issued to the applicant and shall not accept or consider an application for a license for a racing meet in the same parish until the expiration of at least two years from the date of the election at which the racing meet in the parish was disapproved.

G. Any person who conducts or attempts to conduct a racing meet in a parish in which approval of the racing meet at an election is required by this section without such election approval shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the parish jail for not more than six months and, in addition, shall be fined not more than one thousand dollars.

In addition to the penalty provided in this subsection, the district court of the parish of location of the proposed racing meet, upon application of the governing authority of the parish and upon a showing that this

section is applicable and that a racing meet is being conducted or is attempted to be conducted in violation of this section is empowered to and shall grant injunctive relief.

§ 211. Definitions

Unless the context indicates otherwise, the following terms shall have the meaning ascribed to them below:

(1) "Eligible applicants" means the primary licensee fulfilling the licensure criteria described in this Part.

(2) "Exotic wagers" or "exotic wagering pools" include all pari-mutuel pools except the win, place, or show pools conducted at each race meeting in the state. Examples of exotic wagering pools in common usage are daily double pools, exacta pools, trifecta pools, twin trifecta pools, pick-six pools, and quinella pools.

(3) "Host track" means the Louisiana track at which the race is run.

(4) "Offtrack wagering facility" means the licensed and authorized location where offtrack wagers may be accepted.

(5) "Pari-mutuel facility" means any pari-mutuel race track conducting race meetings during the 1986-87 racing season and licensed prior to the effective date of this Part.

(6) "Parish seat" means the facility, courthouse, meeting hall, etc., at which the parish governing authority meets on a regular basis in an official capacity.

(7) "Primary licensee" means the licensed association conducting the majority of race days at a pari-mutuel facility.

§ 212. Offtrack wagering; authorization

The Louisiana State Racing Commission, hereinafter referred to as the commission, is hereby authorized to license offtrack wagering in this state and shall promulgate such rules and regulations as are necessary for the efficient administration of offtrack wagering in this state.

§ 213. Offtrack wagering facilities; establishment

In addition to the rights granted in R.S. 4:149.2, any association licensed by the commission may accept and transmit wagers as provided in this Chapter and engage in all necessary activities to establish appropriate offtrack wagering facilities to accomplish this purpose. Such activities shall include, but not be limited to:

(1) Live simulcast of races from the host track.

(2) Construction or leasing of offtrack wagering facilities.

(3) Sale of goods and beverages.

(4) Advertising and promotion.

(5) All other related activities.

§ 214. Off-track wagering facilities; licensing; criteria; management; appeal of license suspension or revocation

A. License approval shall be subject to the criteria established by R.S. 4:159. Licensure shall be subject to the following conditions:

(1) Only the primary licensee operating at a pari-mutuel facility may apply for a license to operate offtrack wagering facilities in this state and only such primary licensees shall be licensed to operate offtrack wagering facilities under this Part.

(2)(a)(i) Before a license is granted for an offtrack wagering facility in any parish, the voters of that parish must have approved the establishment of such a facility within the parish in a referendum election held for that purpose. The commission shall request a referendum by the governing body of a parish only after receipt of an application for licensure of an offtrack wagering facility in that parish by the eligible applicant as provided in R.S. 4:215.

(ii) If the referendum fails to gain voter approval, or if the commission's request to the parish governing authority for a referendum is not granted within six months of such request, then the request therefor is rendered void.

(iii) Any request for an offtrack referendum that is pending on the effective date of this Subparagraph before the governing authority of a parish wherein such a referendum has failed to gain voter approval in a prior election shall be rendered void upon that date.

(iv) Any request for an offtrack referendum that has been pending before a parish governing authority for six months or more upon the effective date of this Subparagraph shall be rendered void upon that date.

(b)(i) After a request by the commission to a parish governing authority for an offtrack referendum is voided for any reason, the original applicant may either:

(aa) Resubmit the application for licensure, and the commission shall submit a new request for an offtrack referendum election to the parish governing authority; or

(bb) Submit a new application to the commission for licensure of an offtrack wagering facility in any city, town, or municipality within the parish, and the commission shall request the governing authority of such city, town, or municipality to hold an offtrack referendum election.

(ii) If the referendum fails to gain voter approval or if the commission's request for a referendum is not granted within six months of such request, the request therefor is rendered void.

(iii) If the offtrack referendum gains voter approval, the commission may license one offtrack wagering facility within the corporation limits of the city, town, or municipality in which the referendum was held. Such license must conform to all applicable licensing criteria as provided in this Part.

(c)(i) Except as provided in R.S. 4:214(A)(2)(c)(ii), the collection and distribution of license fees as provided in R.S. 4:218 shall not be affected by this Paragraph.

(ii) Notwithstanding any provision of R.S. 4:218 to the contrary, if an off-track wagering facility is located within the corporate limits of a municipality as a result of a municipal off-track wagering referendum as provided in this Paragraph, called by the municipal governing authority without the assistance of the parish governing authority, the municipal governing authority may impose a license fee not to exceed two percent of the total amount wagered at that facility, and no license fee shall be imposed by the parish, and the municipality shall retain the total license fees collected; otherwise, distribution of the fees shall be in accordance with R.S. 4:218(B).

(3) A license shall not be granted to an offtrack wagering facility to be located within a fifty-five mile radius of a pari-mutuel facility without the prior written permission of the primary licensee of that facility.

(4) Not more than two offtrack wagering facilities may be licensed in a parish with a population of less than four hundred twenty-five thousand.

(5) Final license approval is subject to local governing authority facility citing requirements.

(6) Each offtrack wagering facility shall be specifically designed as an entertainment complex. Maximum allowable attendance at each facility shall be one hundred twenty-five percent of the seating capacity at that facility.

(7) Each offtrack wagering facility shall be specifically designed as an entertainment complex. Maximum allowable attendance at each such facility shall be one hundred twenty-five percent of the seating capacity at that facility. At least one area for patrons at each offtrack

wagering facility shall be designated as a nonsmoking area.

B. (1) Licenses granted by the commission shall be valid for a ten-year period. In the event of the sale of the pari-mutuel facility, such license may be transferred and remain valid for the balance of the term of the license. If the conditions of the sale do not include the transfer of the offtrack wagering facility license, such license shall be automatically voided upon the completion of the sale.

(2) In the event a primary licensee is granted approval by the Louisiana State Racing Commission to transfer its live racing dates to another pari-mutuel facility, such primary licensee shall retain all the rights, privileges, and obligations relative to offtrack wagering facilities as provided in this Part as though it remained a primary licensee, as defined in R.S. 4:211(7), in its original location.

C. License applications shall be accompanied by a good faith deposit of one thousand dollars.

D. All primary licensees are eligible for licensure at their existing horse racing facilities as offtrack wagering facilities. Such primary licensees shall not be subject to the licensing requirements in R.S. 4:214(A)(2).

E. There shall be no penalty for closing a licensed offtrack wagering facility provided the licensee submits written notice to the commission at least thirty days prior to closure. The commission shall notify all eligible applicants of the notice of closure. Ownership of an offtrack wagering facility may be transferred to other eligible

applicants subject to all licensing requirements except as provided in R.S. 4:214(A)(2).

F. Nothing in this Part shall be construed as preventing licensees from jointly owning or contracting for the management of any or all licensed offtrack wagering facilities.

G. In no case may offtrack wagering facilities accept wagers on races run at any track without a contract with the licensee operating the host track. This contract shall include all terms and conditions for use of races run at the host track by the offtrack wagering facility, including compensation of the host track for such use. This contract shall be filed with the commission. No host track may deny the use of its races by any other offtrack wagering facility in Louisiana under the same terms and conditions.

H. In no case shall an offtrack wagering facility allow the admission of any person less than eighteen years old. However, the provisions of this Paragraph shall not apply to any offtrack wagering facility located on the premises of a pari-mutuel facility as defined in R.S. 4:211(5).

I. In addition to license fees, each licensee shall pay the fees provided for in this Subsection. Each licensee shall begin paying the fees on the first day of the second year in which the licensee operates the facility. The licensee shall pay to the collector twenty-five cents for each person attending the offtrack wagering facility other than licensed personnel, employees, officials, and working press. These payments shall be made at the conclusion of each calendar week and shall be accompanied by

a report under oath showing the total contributions and admissions, and any other information which the commission may require.

J. (1) Should the commission suspend or revoke the license of a primary licensee, the licensee may, within ten days of the notification of the commission's decision take a suspensive appeal to the district court having jurisdiction over the licensee's offtrack wagering facility. The appeal shall be filed in the district court in the same manner as an original suit is instituted thereon. Each appeal shall be tried de novo. Either party may amend and supplement his pleadings and additional witnesses may be called and heard.

(2) Within ten calendar days of the signing of the judgment by the district court in any such appeal case, the commission or the applicant for a license or licensee, as the case may be, may suspensively appeal the judgment to the appellate court of proper jurisdiction. The appeal shall be perfected in the manner provided for in civil cases and shall be suspensive or devolutive in the discretion of the court.

(3) All proceedings in the district and appellate courts arising under this Part are civil in nature and shall be heard summarily by the court, without a jury, shall take precedence over other civil cases, and shall be tried in chambers or in open court, and in or out of term.

§ 214.1. Minimum live racing dates; offtrack and other authorized wagering

An association shall not be licensed to conduct offtrack or other authorized wagering in the state unless it

conducts live horse racing for not less than eighty racing days within a twenty week period at the facility designated in its license, unless the association is prevented from live racing as a result of a natural disaster, an act of God, force majeure, a catastrophe, or such other occurrence over which the association has no control. When a pari-mutuel wagering facility and a related offtrack betting facility are sold, the purchaser shall conduct the minimum number of live racing days required by this Section as a condition of operating the offtrack betting facility.

§ 215. Offtrack wagering facilities, ownership

A. Only a primary licensee of a pari-mutuel facility may own and operate an offtrack wagering facility in a parish whose parish seat is located less than fifty-five miles from such facility.

B. Offtrack wagering facilities to be located in parishes whose parish seat is less than fifty-five miles from more than one pari-mutuel facility must be jointly owned by those facilities. Such jointly owned facilities shall be subject to the following provisions:

(1) Percentage of ownership shall be inversely proportional to the distance from the pari-mutuel facility to the parish seat of the parish in which the proposed facility is to be located.

(2) A copy of a written agreement between all eligible applicants for licensure of offtrack wagering facilities in a parish must be submitted to the commission with the application for licensure.

(3) If an eligible applicant does not wish to participate in the establishment of offtrack wagering facilities with other eligible applicants, he shall so state in writing within thirty days of receipt of notification, a copy of which shall be included with the application for licensure submitted by any other eligible applicants.

C. Ownership of offtrack wagering facilities in parishes whose parish seat is fifty-five miles or more from any pari-mutuel facility shall be determined by the following procedure:

(1) Any applicant eligible for licensure of an offtrack wagering facility desiring to establish such a facility in a parish covered by this Subsection shall provide written notification of this intent to the commission.

(2) The commission shall notify all other eligible applicants under the provisions of this Part of this intent.

(3) All eligible applicants must respond within thirty days of receipt of this notice of intent if they wish to participate in the joint ownership of an offtrack wagering facility in that parish. Ownership shall be distributed equally among eligible applicants who choose to participate, unless agreed to and contracted otherwise by such eligible applicants. Applicants who fail to respond within thirty days will not be eligible to participate in any offtrack wagering facility in the parish.

(4) All eligible applicants indicating their wish to participate in joint ownership of an offtrack wagering facility must submit a joint application for licensure pursuant to the provisions of R.S. 4:214.

LOUISIANA REVISED STATUTES
TITLE 36. ORGANIZATION OF EXECUTIVE BRANCH OF STATE GOVERNMENT
CHAPTER 1. GENERAL PROVISIONS

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Current through all 1999 Regular Session Acts

§ 4. Structure of executive branch of state government

A. In accordance with the provisions of Article IV, Section 1 and Article XIV, Section 6 of the Constitution of Louisiana, all offices, boards, commissions, agencies, and instrumentalities of the executive branch of state government, whether constitutional or statutory, and/or their functions, powers, duties, and responsibilities shall be allocated, either in the Act by which this Title was created or by legislation enacted subsequent thereto, within the departments listed in this Section, except as provided in Subsections B and C hereof, and in order to comply with this constitutional mandate, the agencies of the executive branch of state government hereinafter enumerated, whether heretofore created by the constitution or by statute, and/or their functions, powers, duties, and responsibilities are allocated, in the manner hereinafter set forth in this Title, within the following designated departments:

(1) Department of State Civil Service

(2) Department of Economic Development . . .

§ 109. Transfer of boards, commissions, departments, and agencies to Department of Economic Development

A. The transfers and abolitions of agencies hereinafter made in this Section shall be effective as provided in Chapter 24 of this Title.

B. The following agencies, as defined in R.S. 36:3, are transferred to and hereafter shall be within the Department of Economic Development, as provided in R.S. 36:801:

(1) The Louisiana State Racing Commission (R.S. 4:141, et seq.)

LOUISIANA REVISED STATUTES
TITLE 42. PUBLIC OFFICERS AND EMPLOYEES
CHAPTER 1. TERMS OF OFFICE OR EMPLOYMENT

§ 5. Meetings of public bodies to be open to the public

A. Every meeting of any public body shall be open to the public unless closed pursuant to R.S. 42:6, R.S. 42:6.1, or R.S. 42:6.2.

B. Each public body shall be prohibited from utilizing any manner of proxy voting procedure, secret balloting, or any other means to circumvent the intent of R.S. 42:4.1 through R.S. 42:8.

C. All votes made by members of a public body shall be viva voce and shall be recorded in the minutes, journal, or other official, written proceedings of the body, which shall be a public document.

LOUISIANA REVISED STATUTES
TITLE 49. STATE ADMINISTRATION
CHAPTER 13. ADMINISTRATIVE PROCEDURE

§ 950. Title and form of citation

This Chapter shall be known as the Administrative Procedure Act and may be cited as the Administrative Procedure Act.

§ 951. Definitions

As used in the Chapter:

(1) "Adjudication" means agency process for the formulation of a decision or order.

(2) "Agency" means each state board, commission, department, agency, officer, or other entity which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana, except the legislature or any branch, committee, or officer thereof, any political subdivision, as defined in Article VI, Section 44 of the Louisiana Constitution, and any board, commission, department, agency, officer, or other entity thereof, and the courts.

(3) "Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing, and including non-revenue licensing, when the grant, denial, or renewal

of a license is required by constitution or statute to be preceded by notice and opportunity for hearing.

(4) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

(5) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency, except that an agency is a "person" for the purpose of appealing an administrative ruling in a disciplinary action brought pursuant to Title 37 of the Louisiana Revised Statutes of 1950 prior to the final adjudication of such disciplinary action.

§ 955. Adjudication; notice; hearing; records

A. In an adjudication, all parties who do not waive their rights shall be afforded an opportunity for hearing after reasonable notice.

B. The notice shall include:

(1) A statement of the time, place, and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes and rules involved;

(4) A short and plain statement of the matters asserted.

If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

D. Unless precluded by law, informal disposition may be made of any case of adjudication by stipulation, agreed settlement, consent order, or default.

E. The record in a case of adjudication shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered or a resume thereof if not transcribed;

(3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose;

(4) Offers of proof, objections, and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, opinion, or report by the officer presiding at the hearing.

F. The agency shall make a full transcript of all proceedings before it when the statute governing it requires it, and, in the absence of such requirement, shall, at the request of any party or person, have prepared and

furnish him with a copy of the transcript or any part thereof upon payment of the cost thereof unless the governing statute or constitution provides that it shall be furnished without cost.

G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 961. Licenses

A. When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Chapter concerning adjudication shall apply.

B. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

C. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in

its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

§ 964. Judicial review of adjudication

A. (1) Except as provided in R.S. 15:1171 through 1177, a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review under this Chapter whether or not he has applied to the agency for rehearing, without limiting, however, utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury.

(2) No agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter.

B. Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located within thirty days after mailing of notice of the final decision by the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

C. The filing of the petition does not itself stay enforcement of the agency decision. The agency may

grant, or the reviewing court may order, a stay ex parte upon appropriate terms, except as otherwise provided by Title 37 of the Louisiana Revised Statutes of 1950, relative to professions and occupations. The court may require that the stay be granted in accordance with the local rules of the reviewing court pertaining to injunctive relief and the issuance of temporary restraining orders.

D. Within thirty days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

E. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

F. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not

shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

(7) In cases covered by R.S. 15:1171 through 1177, manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

§ 965. Appeals

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. The appeal shall be taken as in other civil cases.

APPENDIX C

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., ET AL.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961 c/w Suit No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

APPELLANT'S ORIGINAL BRIEF ON APPEAL FROM A RULING IN A CIVIL PROCEEDING BY THE HONORABLE ROBIN GIARRUSSO

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JURISDICTION

Appellant shows that the Court of Appeal has jurisdiction over this matter under La. Const. of 1974, Art. 5 § 10, LSA-C.C.P. art. 2081, et seq. and Rule 1-3, "Scope of Review," Uniform Rules-Courts of Appeal.

STATEMENT OF THE CASE

Livingston Downs Racing Association, Inc. ("LDRA"), appellant in the above entitled and numbered cause, appears herein to appeal the trial court's grant of the Motion to Dismiss filed by the Louisiana State Racing Commission ("Commission") by the Honorable Robin Giarrusso on December 4, 1998. On November 15, 1996 the parties and this court entered into a consent judgment (a copy of which is attached to LDRA's opposition to the

motion to dismiss as Exhibit "A") which provides in pertinent part:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.
>
> 7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.
>
> 8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).
>
> 9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and

financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent judgment was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, State of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's previous ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit

further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed.

On August 30, 1996 LDRA named current and former Commission members, Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas, together with Melinda Tucker, former attorney for the Commission, as defendants in a suit filed in U.S. District Court, Middle District of Louisiana captioned *Livingston Downs Racing Association, Inc. v. Jefferson Downs Corporation, et al.*, Civil Action No. 96-3430-B-M1. Among the allegations contained in the petition were conspiracy to violate anti-trust and restraint of trade and § 1983 Civil Rights violations for illegal actions under color of state law.

Shortly thereafter, the Commission defendants approached LDRA to discuss a resolution of the issues. LDRA had no desire to harm individual members. LDRA's only desire was to move forward with its efforts to build its race track project. LDRA only wanted the Commission to cease its efforts in violation of the racing statutes which interfered with LDRA's efforts to build its race track. If the Commission would not follow its mandate under the racing statutes to assist LDRA in its efforts, then it at least should not cause further interference and delays.

With these objectives in mind, LDRA negotiated the consent judgment, and in return dismissed the Commission defendants from the federal lawsuit.

Had the parties not entered into a consent judgment, the issue of the license revocation would have proceeded to trial on the merits in Judge Giarrusso's court. The record and law clearly supported LDRA's position. Furthermore, the some [sic] Commission members would have faced an expensive trial in federal court, with significant exposure to personal monetary damages. It is now apparent that LDRA negotiated the consent judgment in good faith. The Commission members, on the other hand, negotiated in bad faith to secure a release to their benefit and simply waited for an opportunity to retaliate and punish LDRA.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish (the "Odom suit"). This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of horse racing in Livingston Parish. A copy of the dismissal order signed by the First Circuit Court of Appeal is attached to LDRA's opposition to the motion to dismiss as Exhibit "B".

As soon as the dismissal was ordered, LDRA sent a written request to the Commission for an extension of the October 31, 1998 deadline contained in the Consent Decree. A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "C".

On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission

was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "D". A meeting notice was forwarded to Mr. Bursavich. A copy of the meeting notice is attached to LDRA's opposition to the motion to dismiss as Exhibit "E".

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. Therefore, the subsequent letter of October 22, 1998 denying LDRA's request is in violation of the Open Meetings Law.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on LDRA's request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. A

copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "F". LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. A copy of these letters are attached to LDRA's opposition to the motion to dismiss as Exhibits "G" and "H," respectively. On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. A copy of the commitment is attached to LDRA's opposition to the motion to dismiss as Exhibit "I". LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, unknown actors arbitrarily and capriciously rejected said commitment without even communicating with the lender or LDRA. The action of the unknown actors is in direct violation of the Administrative Procedure Act, is in bad faith, violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

On November 10, 1998 counsel for the Commission, without legal authority, filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter

timely. However, the Commission has not even acknowledged receipt of said commitment or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "J". This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before the trial court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarrusso's office and was advised by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and advise that LDRA would be allowed oral argument on the motion.

ACTION OF THE TRIAL COURT

On December 4, 1998 the motion was scheduled for hearing before Judge Giarrusso. Despite the fact numerous exceptions were filed by LDRA, along with a petition for writ of mandamus and a motion to enforce Section 16 of the consent judgment, the hearing lasted less than ten minutes. After a brief opening statement by counsel for the Commission, Judge Giarrusso recognized Mr. Victor Sachse, III, counsel for LDRA. Mr. Sachse noted that Mr. Paul Burgess, Executive Director of the Commission, and Ms. Kim Chatelain, counsel for the Commission, were present. Mr. Sachse requested that the Judge issue an instanter subpoena to these two parties in order to establish that there had been no official action taken by the Commission which authorized the filing of the subject motion to dismiss. Judge Giarrusso responded by advising Mr. Sachse that he could get them (the subpoenas) from the Fourth Circuit because she was granting the motion to dismiss. Judge Giarrusso advised Ms. Chatelain to draw up the order and that she would sign the order the same day. The hearing was then concluded and the order of dismissal was signed on December 4, 1998 within hours of the hearing.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting the motion to dismiss and overruling all exceptions without a contradictory hearing when the Commission had taken no official action to authorize the filing of the motion to dismiss in clear violation of LSA-R.S. 42:6, et seq.

2. The trial court erred in failing to address the issue that the Commission failed to follow the procedures

dictated by LSA-R.S. 49:961, which deals with revocation of a license and LSA-R.S. 49:955 which governs adjudicatory proceedings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission, as an administrative agency, is required to comply with the provisions of the Open Meetings Law, LSA-R.S. 42:6, et seq.

2. Whether the Commission's motion to dismiss is a violation of the Open Meetings Law when the Commission had taken no official action to authorize the filing of the motion to dismiss in clear violation of LSA-R.S. 42:6.

3. Whether the Commission, as an administrative agency, is required to comply with the provisions of the Administrative Procedure Act governing revocation of a license, LSA-R.S. 49:961 and governing adjudicatory hearings, LSA-R.S. 49:955.

4. Whether the Commission's motion to dismiss is a violation of the provisions of the Administrative Procedure Act governing revocation of a license, LSA-R.S. 49:961 and governing adjudicatory hearings, LSA-R.S. 49:955.

5. Whether the trial court's ruling is in effect a final ruling upholding the original action taken by the Commission to revoke LDRA's license and therefore, the original ruling of the Commission is the proper subject matter before the Court in this appeal.

ARGUMENT OF ASSIGNMENTS OF ERROR

A. Argument of Assignment of Error No. 1

The settlement agreement, which is the subject of the motion to dismiss is a contract between the plaintiff and the defendant in the form of a consent judgment, which was approved by the Commission in open meeting in compliance with the statutes.

The Commission's actions are governed by the Administrative Procedures Act and by LSA-R.S. 42:6, the open meetings law. There exists no authority for the Commission's attorney or the Commission's chairman to unilaterally take action on behalf of the Commission without first having the matter heard by the full Commission and a vote taken on the subject matter. There is no record of this matter being heard in open meeting, therefore, there is no legally authorized motion before this Court.

There is no record of any meeting of the Commission to discuss the alleged breach of the consent judgment and/or to authorize the filing of the motion to dismiss. At best, it may be argued that a telephone poll was taken. However, Attorney General Opinion No. 88-340, August 19, 1988 states:

> A telephone poll cannot be used to authorize action by a board; this would result in a violation of the open meeting requirement.
>
> A telephone poll would be in clear violation of LSA-R.S. 42:5.

LSA-R.S. 42:9[1] gives clear authority for this court to dismiss the Commission's motion to dismiss. LDRA's challenge in the form of its exception falls within the sixty day time limit.

It has been subsequently learned that a meeting of the Commission's legal committee was allegedly held at the office at the office [sic] of Albert Stall, Commission Chairman on November 4, 1998. If held, this meeting was not held in accordance with LSA-R.S. 42:5. Furthermore, this committee was without power to authorize the filing of the motion to dismiss. Attorney General Opinion No. 76-1399, October 13, 1976 states:

> Committee meetings or executive sessions of public body are subject to open meeting laws *even if no final action can be taken at such meeting or session.*

B. Argument of Assignment of Error No. 2.

The underlying purpose of the Commission's actions are to finally revoke all licenses issued by the Commission to the plaintiff. Clearly, the allegation of defendant's motion constitutes a finding of fact and the motion to dismiss is clearly an adjudication. The arguments presented herein apply to the current actions of the

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[1] LSA-R.S. 42:9 Voidability.

Any action taken in violation of R.S. 42:4.1 through 42:8 shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action.

Commission as well as the previous actions of the Commission which were the basis of the suspensive appeal by LDRA.

The procedures to be followed in an adjudication are outlined in LSA-R.S. 49:955. In *Tafaro's Inv. Co., Inc. v. Division of Housing, Inc.*, 261 La. 183, 259 So.2d 57 (1972) the court wrote:

> Where administrative agency adjudicates private property rights and obligations, parties must be afforded an opportunity to be heard, and, if private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative actions.

Here, the Commission made absolutely no attempt to comply with the law and there is no compelling public interest to rush to judgment.

In addition to the statutory requirements of LSA-R.S. 49:955, in the matter of a license application, LSA-R.S. 49:961 imposes special conditions. More specifically, R.S. 49:961(C) reads in pertinent part:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, *prior* to the institution of agency proceedings, the agency gives notice to the licensee of facts or conduct which warrants the intended action, *and the licensee is given the opportunity to show compliance with all lawful requirements for the retention of the license.* (Emphasis ours.)

In *La. State Board of Medical Examiners v. Bertucci*, 598 So.2d 798 (La. App. 4th Cir. 1992), the court wrote:

> Though under Administrative Procedure Act, notice and opportunity to be heard are required in any adjudication proceeding, *additional step* is required with respect to suspension, revocation, annulment or withdrawal of an existing license, whereby agency must give licensee an opportunity, *prior* to institution of formal proceedings, to show that the actions complained of do not violate the law or agency rules.

Here, LDRA in a good faith effort to comply with the consent decree, filed an application to reinstate its license and provided the Commission with a commitment for $10 million in financing. Without contacting or advising LDRA, or its lender, unknown persons acting without authority, flatly rejected LDRA's application and arbitrarily and capriciously declared that the commitment letter was not binding and enforceable. Subsequent to learning of the Commission's actions, LDRA's lender, RFG wrote to the Commission and offered to amend the commitment to meet the arbitrary objections to the commitment.

The very purpose of administrative procedures as directed by *Bertucci, supra*, was to allow licensed persons to respond to allegations set forth by the licensing agency with the objective of allowing the licensee to cure any problems without the need to proceed to a revocation hearing. Here, the Commission raised a laundry list of frivolous attacks on the provisions of a financing agreement between two parties, both of whom consider themselves bound by the commitment. Both parties to the agreement offered to meet with the Commission to amend the commitment to remove any objections, either real or frivolous, to the satisfaction of the Commission.

Had the Commission followed the Administrative Procedure Act, all differences could have been resolved and the motion to dismiss would have been unnecessary.

LDRA respectfully urges this Honorable Court to send a strong message to the Commission that it is required to follow the laws of this State and its own rules.

CONCLUSION

LDRA made a reasonable request to extend the time frames under the consent judgment due to the fact that the Odom suit made it impossible for LDRA to obtain financing. For over six years no other party has expressed an interest in building a race track to provide live racing dates desperately needed by the Louisiana horse industry. One may question the need to rush to judgment and get rid of LDRA. Can it be only coincidence that on November 14, 1999, just four days after the Commission's motion to dismiss the Fair Grounds filed a motion for summary judgment in the federal anti-trust? The motion listed in detail the Commission's actions as a major defense to the allegations set forth in LDRA's complaint. Is it further coincidence that the so-called legal committee of the commission included Albert Stall, Oscar Tolmas and Payton Covington who were former co-defendants with the Fair Grounds in the federal anti-trust lawsuit? Had the Commission performed its obligations under the consent judgment and followed the procedures as required by the Administrative Procedure Act it could not have accommodated the Fair Grounds' motion for summary judgment.

The Commission did not properly perform its duties according to statute or in good faith. This motion was improperly before the trial court.

It is clear from the series of events and documentation provided that Section 16 of the consent judgment is applicable and that appellant LDRA, not the Commission, is entitled to seek appropriate relief before the trial court. The Commission, in bad faith, breached its agreement with LDRA and therefore, this case should be reinstated before the trial court.

While this appeal addresses the ruling of the trial court on the motion to dismiss, it does not end the controversy. The whole matter begins with the illegal manner in which the Commission revoked the racing licenses and permits to LDRA. Facing probability of an adverse ruling, the Commission has consistently delayed the inevitable. LDRA is faced with a "catch-22" situation. The Commission alleges that LDRA's license must be revoked because it does not have financing. On the other hand, LDRA cannot get financing for a race track development without assurance of a racing license. In the meantime the horsemen and state and local governments are deprived of revenue and the people of Livingston Parish are deprived of jobs.

The trial court's ruling has the actual effect of upholding the Commission's action in revoking LDRA's license. Therefore, this Court has before it the original appeal of the Commission's ruling which was apparently upheld by the trial court's grant of the Commission's motion to dismiss. This issue has more than once been before this Court. The central issue has been thoroughly

briefed and this Court has before it a complete record from which to reach its decision. We respectfully urge that the Court issue a final ruling on the issue of the license revocation. Given reasonable time without any barriers erected by the Commission or competitors, LDRA can move forward with its race track development.

Respectfully submitted:

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on opposing counsel by facsimile and by placing same in the United States mail, postage prepaid and properly addressed this 2nd day of June, 1999.

/s/ Darlene S. Ransome
Darlene S. Ransome

EXHIBIT

Appendix 1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NOS. 92-20961 c/w
95-15331

DIVISION "G"
SECTION "11"

DOCKET:

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

JUDGEMENT

The above captioned proceeding came for hearing on the merits of defendant, LOUISIANA STATE RACING

COMMISSION, Motion To Dismiss on Friday, December 4, 1998:

PRESENT: KIM RAINES CHATELAIN,
Attorney for defendant, Louisiana State Racing Commission

VICTOR A. SACHSE, III
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

DARLENE S. RANSOME
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

After considering the law, the evidence, and for the reasons orally assigned

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana State Racing Commission, dismissing the above captioned suit by plaintiff, Livingston Downs Racing Association, Inc. against defendant, Louisiana State Racing Commission, with prejudice at plaintiff's cost pursuant to the Consent Judgment entered November 15, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 4 day of December, 1998.

(Sgd.) Robin M. Giarrusse
JUDGE

APPENDIX D

[Exhibits Omitted In Printing]

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

No. 99-CA-1001

Jefferson Downs, Inc. et al
versus
Louisiana State Racing Commission
No. 92-20961, Division "G"

consolidated with

LIVINGSTON DOWNS RACING ASSOCIATION, INC.
Plaintiff/Appellee

VERSUS

LOUISIANA STATE RACING COMMISSION

No. 95-15331, DIVISION "J" TRANSFERRED TO "G"

consolidated with

Livingston Downs Racing Association, Inc.
versus
Louisiana State Racing Commission
No. 97-12435, Division "K" transferred to "G"

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

APPELLEE'S ORIGINAL BRIEF

(Filed July 19, 1999)

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MAY IT PLEASE THE COURT:

Defendant-appellee, Louisiana State Racing Commission, submits the following original brief in response to plaintiff-appellant appeal to this Honorable Court:

This matter comes on appeal from a district court judgment granting defendant's motion to dismiss pursuant to the terms of a consent judgment entered on November 15, 1996.

The purpose of the consent judgment was to afford Livingston Downs two additional years to rehabilitate and make itself financially able to fulfill its obligations under a license to conduct horse racing in Livingston Parish. The Consent Judgment suspended Livingston Downs license further providing that within two years Livingston Downs must submit a new application which included a binding, enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS for the construction of a racing facility, oval and backside or the case be [sic] shall be DISMISSED.

Livingston Downs failed to timely submit an application with a binding, enforceable commitment letter under the terms of the Consent Judgment. The case was dismissed.

This brief will first set forth an [sic] concise introduction explaining to the court how this matter has come before it and the history between the parties leading to the Consent Judgment.

The argument will follow: first stating the issue on appeal and then responding by applying the law as it relates to the facts set forth.

Introduction:

Livingston Downs Racing Association, Inc. ("Livingston Downs") has squandered years blaming others for their inability to construct, open and operate a race track in Louisiana embroiling the State of Louisiana, the Commission, individual Commissioners and others in needless and exhaustive litigation.

First, Livingston Downs blamed the State of Louisiana for being unable to obtain an off-track wagering license arguing no race track in Louisiana could economically survive without off track wagering revenue. This argument was abandoned when the state Supreme Court upheld the constitutionality of a statute which prevents Livingston Downs from ever securing an off-track wagering license.[1] Still, it sued the Commission for off track wagering rights it did not have.[2]

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[1] La.R.S. 4:211(5); **Livingston Downs Racing Assoc., Inc. v. State of Louisiana, et al,** La. No. 96-CA-2890.

[2] **Livingston Downs Racing Assoc. v. La. State Racing Comm'n,** No. 97-12435, Div "K" c/w No. 95-15331 "J" c/w No. 92-20961 "G", Civil District Court, Orleans Parish, Louisiana; 4th Circuit Court of Appeal No. 98-CA-1229 (affirming trial court judgment to dismiss suit).

Next, Livingston Downs blamed both those who opposed the racetrack and those, the Commissioners, who approved it.[3]

Finally, Livingston Downs blamed the Commission pretermitting it was the Commission who first granted Livingston Downs a license.

The seven years of Livingston Downs litigation extends over three parishes and involves numerous appeals.

The instant action arises from the Commission's decision on August 29, 1994 to withdraw, revoke and terminate the ten (10) year license issued on May 27, 1993 to Livingston Downs and a license and/or permit issued on August 26, 1993 to conduct a live race meet.

Livingston Downs filed a Petition for Trail De Novo and Suspensive Appeal to the 21st Judicial District Court, Livingston Parish, Louisiana appealing the Commission's decision.[4] The matter was transferred to Civil District Court pursuant to La.R.S. 4:145.1 and consolidated with a related matter.[5] The case was subsequently dismissed as untimely. The Fourth Circuit Court of Appeal reversed

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[3] **Livingston Downs Racing Assoc., Inc. v. Jefferson Downs Core., et al,** La.M.D., No. 96-3430.

[4] **Livingston Downs Racing Assc. v. La. State Racing Comm'n,** No. 71,137, 21st Judicial District Court, Livingston Parish, Louisiana.

[5] **Livingston Downs Racing Assc., Inc. v. La. State Racing Comm'n,** No. 95-15331, Div "J" c/w **Jefferson Downs, Inc. et al v. La. State Racing Comm'n,** No. 92-20961, Div. "G", Civil District Court, Orleans Parish, Louisiana.

and remanded the matter for further proceedings.[6] The court did not, as Livingston Downs represents, reverse the Commission's decision but reinstated the suspensive appeal. Thereafter, the suit was eventually resolved by the Consent Judgment, attached hereto for ready reference.

The Consent Judgment was part of a larger settlement between Livingston Downs and the Commission entered into in November 1996. Referenced by Livingston Downs in its original brief to the court, the settlement agreement is **de hors** the record but a copy is attached hereto should the court wish to review it.

At the time, Livingston Downs confronted issues brought by the juxtaposition of retaining the racing licenses while avoiding its responsibilities. It faced an independent audit by the Commission pursuant to 4:153 regarding Livingston Downs failure or financial inability to fulfill the purpose for which its licences were issued, ie. live horse racing, as well as a hearing on a rule to show cause why it should not be responsible for minimum license fees totaling $200,000. Most importantly, Livingston Downs risked an adverse ruling following a trial on the merits.

The settlement, including the Consent Judgment, entered into by Livingston Downs and the Commission was approved by the Commission on November 15, 1996 in an Open Meeting held in accordance with La.R.S. 42:6.

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[6] **Livingston Downs Racing Assoc., Inc. v. La. State Racing Comm'n,** 675 So.2d 1214 (La.Ct.App. 4th Cir. 1996).

The Consent Judgment provides that the license issued to Livingston Downs shall be suspended and the Commission shall not except as provided be required to consider Livingston Downs as a licensed racing association. The Consent Judgment further provided the following:

1. that the Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish;

2. that any application for permits or license to be issued to Livingston Downs Racing Association shall include within the application **"binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside;

3. the commitment must issue from source suitable to and acceptable to the Commission, after prompt investigation.

At no time was the terms of the settlement nor the Consent Judgment contingent upon the resolution of any other pending litigation.

Yet, Livingston wrote the Commission, just as the deadline approached, requesting a one year extension now citing a recent resolution of certain pending litigation as the delay. Under no obligation to respond to the request, the Commission considered the request in an executive session convened under the Open Meeting law on September 26, 1998 before advising by letter:

"As you are aware, the terms and conditions of the Consent Judgment were reached only after exhaustive and extensive negotiations by both sides the purpose of which was to provide a [sic] amicable means to an end to multiple litigations.

The Commission remains committed to abide by the terms of the Consent Judgment as entered."

On October 30, 1998 the Commission received via fax the following documents:

1. an application by Livingston Downs Racing Association, L.L.C. (not Livingston Downs Racing Association, Inc.) for racing licenses;

2. financial Statement of Livingston downs Racing Association, L.L.C.;

3. Balance sheet of Livingston Downs Racing Association, Inc.

4. A **"Conditional Commitment for Collateralized Mortgage Financing"** by Remington Financial Group, Inc. to applicant Mr. A1 J. Ransome, Livingston Downs Racing Association, Inc.

The Conditional Commitment for Collateralized Mortgage provides the commitment is not valid unless a copy of such commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998. The documents received by fax on October 30, 1998 did not have attached thereto any signature page for the Conditional Commitment. An original application and a copy of the Commitment with the signature page was

later received via federal express on Monday, November 1, 1998.

On November 10, 1998, the Commission filed a Motion to Dismiss as provided by the Consent Judgment contending that Livingston Downs failed to satisfy the terms and conditions of the Consent Judgment in the following particulars:

1. The Conditional Commitment for Collateralized Mortgage Financing is not a binding and enforceable commitment in an amount not less than Ten Million ($10,000,000.00) Dollars;

2. The Conditional Commitment allows for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group, Inc. subordinating the Commission regulatory authority under La.R.S. 4:147(4) to that of another.

3. The application for license was not made by Livingston Downs Racing Association, Inc. now known as ALDAR, Inc. but by Livingston Downs Racing Association, L.L.C. a separate and distinct legal entity from the party to this suit.

The motion was set for contradictory hearing in Civil District Court on December 4, 1998 and Livingston Downs was served with notice through its counsel of record. Following the argument of counsel and after considering the law and evidence, the court dismissed the suit at plaintiff's cost in accordance with the terms of the Consent Judgment.

Livingston Downs now appeals this ruling.

ARGUMENT

Livingston Downs makes two assignment [sic] of errors. First, it argues the trial court erred in granting the motion to dismiss because the Commission has failed to comply with the mandates of the Administrative Procedure Act and/or Open Meeting Law. Secondly, Livingston Downs urges the motion to dismiss constituted a finding of fact and was an improper adjudication of a license.

These assignments of error have little to do with the issue before the trial court and only valid issue on appeal and that is whether Livingston Downs timely complied with the terms of the Consent Judgement entered into between the parties and made the judgment of the court in this matter. More specifically, has Livingston Downs submitted to the Commission with an application a **"binding, enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"**.

It is of no moment under the Consent Judgment how the issue came to be heard by the trial court. If the trial, and this court, cannot find as a matter of law that Livingston Downs timely submitted an application which included a binding, enforceable commitment letter then neither could the Commission. If the Commission could not and Livingston Downs has not, the case must be dismissed none of which pretermit Livingston Downs at any later date upon its financial ability to re-apply.

Livingston Downs did not satisfy the terms of the Consent Judgment nor has it submitted to the Commission a binding, enforceable commitment letter.

Because the issue is dispositive, the Commission will first address whether Livingston Downs complied with the terms of the Consent Judgment. Thereafter, the merits of Livingston Downs assignment of errors will be separately addressed.

1. Application Failed To Include Binding, Enforceable Commitment Letter

Livingston Downs represents to the court that it filed an application to the Commission, which was arbitrarily and capriciously rejected, but nowhere does Livingston Downs state the application included a binding, enforceable commitment letter per the terms of the Consent Judgment.

The document entitled **"Conditional Commitment For Collateralized Mortgage Financing"** made a part of the application by Livingston Downs, L.L.C. purportedly provides for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but is subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which is based on the **"sole and absolute discretion of Remington Financial Group, Inc."**. A copy of the commitment is attached hereto for ready reference. These terms and conditions include by way of example:

1. "[t]he loan amount ("Loan") will be in the principle amount of $10,000,000. Said loan

amount shall not exceed 80% of subject property's Fair Market Value.

2. "[t]his Loan commitment is contingent on Borrower having the capability, **in its sole discretion** of Lender, of servicing and repaying of Loan in accordance with its terms";

3. "[alt and in all events, this Loan commitment is subject to Lender's approval **in its sole discretion** of all necessary documentation relating to Borrower, Project and Collateral;

First, the Conditional Commitment is not enforceable as it is replete with suspensive conditions the satisfaction of which is wholly contingent on the sole discretion of lender, Remington Financial. La.C.C. art. 1770 provides that a suspensive condition that depends solely on the will of the obligor makes the obligation null.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Association, Inc., et al v. HNC Realty Company et al,** 531 F.2d 1249 (5th Cir. 1976). The **Willowood** court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. In that case, there was no delineation of essential elements of a loan including failure to set forth with specificity how and when interest on the loan would be adjusted or paid, how and when disbursements would take place or [sic] a mortgage. Further, the purported commitment letters implied there would be further negotiations which would take place. Here, the court held that a letter setting forth terms upon which a loan to developers would be made subject

to approval of a loan committee which failed to include essential terms of a loan was not an enforceable loan commitment. (**Willowood,** at 1252) (citing **Wheeler v. White** 385 S.W.2d 619 (1964), rev'd on other grounds, 398 S.W.2d 93 (1965) holding that a loan commitment which provided the principal amount of loan, interest, and term but failed to provide amount of monthly payments was unenforceable.)

The Conditional Commitment provided by Livingston Downs is likewise nothing more than a letter setting forth terms upon which a loan may be made but is not in and of itself an enforceable loan commitment. There is no funding date specified; while the term of the note may be set at 60 months, there is no monthly payment set forth; rate of interest is not set forth-with specificity; there is no commitment fee paid which is evidenced by the writing; and it implies the need for substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors the author of the commitment may find.

Next, the Consent Judgment required a binding, enforceable loan commitment of not less than Ten Million ($10,000,000) Dollars. The "loan commitment" provided is not for an amount not less than Ten Million ($10,000,000) Dollars but for an amount not to exceed Ten Million Dollars providing the fair market value of the project is worth at least Twelve Million Five Hundred Thousand ($12,500,000) or 80%.

Finally, the Conditional Commitment allows for ownership in the "project" by unknown persons at the sole

discretion of Remington Financial Group, Inc. **See** Paragraphs 7, 8 & 11 of Commitment.

La.R.S. 4:147 (4) requires each applicant seeking license as a racing association to set forth the names of the stockholders and directors of the corporation.

The Conditional Commitment implies that RFG and/or subsequent unknown investors will have an ownership interest in the "project" as a condition of financing. When, where, how and in what form this interest may manifest itself is unknown and undisclosed to the Commission at this time. However, in any event such a condition inevitably subordinates the Commission's regulatory authority under La.R.S. 4:147 to that of the financier of the "project".

2. Livingston Downs Racing Association, Inc. Has Not Made Application

The terms of the Consent Judgment provided that the Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish.

Livingston Downs Racing Association, Inc. did not make application to the Commission for a ten year license. Rather, Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity not previously licensed by the Commission, made application to the Commission. **See,** Vol. 1 of 2 at p. 89, Motion to Dismiss exh. 1 **in globo.**

Livingston Downs Racing Association, Inc. is a Louisiana corporation formed in October 1992 by A1 Ransome

who is registered agent and president. There were no other officers or directors. The licenses and permits at issue in this litigation were granted to Livingston Downs Racing Association, Inc.

In October 1998, Livingston Downs Racing Association, Inc. changed its name to ALDAR Investments, Inc. **See** Vol 1 of 2 at p. 120, Motion to Dismiss, exh. 2, **in globo.**

At or about the same time, Darlene S. Ransome now acting as agent for ALDAR, Inc. formerly known as Livingston Downs Racing Association, Inc. formed Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity. The limited liability company articles of incorporation are signed by Darlene Ransome and Al Ransome for Livingston Downs Racing Association, L.L.C. **See** Vol. 1 of 2 at p. 120, Motion to Dismiss, exh. 2, **in globo.**

Livingston Downs Racing Association, L.L.C., not plaintiff herein, makes application to the Commission for license. However, the limited liability company attaches to its application Livingston Downs Racing Association, Inc. income statement and balance sheet. According to its balance sheet, Livingston Downs Racing Association, Inc. holds approximately $1 million in assets but $2 million in liabilities. **See** Vol 1 of 2 at p. 89, Motion to Dismiss, exh. 1, **in globo.**

Livingston Downs Racing Association, L.L.C. has a zero net worth.

Livingston Downs represents to the Commission that these alterations were necessary because potential

lenders expressed their desire to do business with a limited liability company rather than a corporation. **See** Vol 1 of 2, at p. 120, Motion to Dismiss, exh. 2, Letter of Darlene Ransome.

However, the Conditional Commitment is made to applicant, A1 J. Ransome and Livingston Downs Racing Association, Inc.

It is not certain or clear the need for participation and alteration of corporate forms or the addition or subtraction of officers, directors or managers.

It is clear that Livingston Downs Racing Association, Inc. has not complied with the terms of the Consent Judgment and has in fact submitted no application.

3. Livingston Downs License Is Governed By Terms of Consent Judgment

Livingston Downs assigns as an error that the Motion to Dismiss filed by the Commission constituted a finding of fact and an improper adjudication of Livingston Downs license.

The Commission adjudicated Livingston Downs license on August 29, 1994 when it withdrew and revoked Livingston Downs ten (10) year license and racing permit for its failure to meet any of its obligations connected with the fulfillment of the purpose for which the license was granted.

Whether the Commission withdrew and revoked the license without cause, as Livingston Downs contended in its original petition, was rendered moot when the parties

entered into the Consent Judgment which afford Livingston Downs two additional years under a suspended license to rehabilitate itself.

Thereafter, the Commission was relegated to Livingston Downs and had neither the authority or cause to further adjudicate Livingston Downs license.

The Consent Judgment anticipates by its terms three possible conclusions to the litigation: (a) Livingston Downs timely files an application which is approved by the Commission; (b) Livingston Downs doesn't file an application or files an application which does not comply; (c) Livingston Downs timely files an application which the Commission fails to approve or otherwise act upon.

In any case, the Consent Judgment clearly defines the remedies.

The remedy available to the Commission is provided at Paragraph 15:

> . . . in the event that Livingston Downs Racing Association, Inc. fails to file an application with a binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including grandstand, racing oval and backside, on the timetable as set forth hereinabove, then these proceedings **shall be dismissed** with prejudice at plaintiff's cost.

The remedy provided to Livingtson Downs is found at Paragraph 16 which states:

> . . . in the event an application [per Paragraph 6 with a binding, enforceable commitment letter]

> is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

These paragraphs must of course be interpreted **impari materia** with Paragraph 6 which requires in pertinent part the following:

> . . . any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc. which application are filed on its behalf and shall conform to the provisions of La.R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), **shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS,** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

The issue before the trial court at the hearing on the Motion to Dismiss was whether Livingston Downs timely filed an application in accordance with the terms of the Consent Judgment which application must include a **binding, enforceable commitment letter in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS.**

Livingston Downs had the right to have the judge review the license application under Paragraph 16 of the

Consent Judgment and make a summary determination after contradictory hearing.

Whether the trial court considered the issue on application by Livingston Downs or on a Motion to Dismiss by the Commission, the issue came for contradictory hearing before the court.

Thus, whether the Commission's Motion to Dismiss constituted an adjudication of the license without complying with the Administrative Procedure Act 49:955 or whether it correctly availed itself of the remedy expressly provided in the Consent judgment is of no moment.

The only issue is whether the court could reasonably conclude that the application submitted by Livingston Downs on October 30, 1998 complied with the terms of the Consent Judgment and included a binding, enforceable commitment in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS. If the court could not, neither could the Commission.

3. Administrative Procedure Has No Further Application To Consent Judgment Approved In Open Meeting

Finally, Livingston Downs first assignment of error is [sic] the Commission failed to comply with the Administrative Procedure Act and Open Meeting law before filing the Motion to Dismiss.

Proceedings before the Commission are governed by the Administrative Procedure Act and Open Meeting Law. However, the Administrative Procedure Act and Open Meeting Law do not apply to pending litigations

which have gone beyond the administrative level. In fact, pending litigation is an exception to the Open Meeting requirements and may be discussed in executive session. La.R.S. 42:6.1.

The Consent Judgment and settlement were approved in accordance with the Administrative Procedure Act in an open meeting convened under the Open Meeting law. Subsequently, the Administrative Procedure Act and Open Meeting law provisions were, as to these parties, preempted by the Consent Judgment which thereafter governed the parties conduct. The motion to dismiss was filed pursuant to the terms of the Consent Judgment.

Further, the Commission is provided an assistant attorney general by statute whose duty it is to advise and represent the Commission in all legal proceedings. La.R.S. 4:146 (A).

It defies all logic to contend the Commission need hold an open meeting to convene into executive session to authorize its attorney to take every action in its defense, ie. to file exceptions, to file an answer, to file a Memorandum or brief. It is equally ridiculous to suggest that the Commission need hold an open meeting to convene into executive session and thereafter vote in open meeting to authorize its attorney to give effect to the clear language of the Consent Judgment.

CONCLUSION

Livingston Downs persists in blaming others for their financial inability to construct, open and operate a race track in Livingston Parish.

The Commission first granted a license to Livingston Downs more than six years ago. It has afforded Livingston Downs every opportunity to fulfill its obligations connected with those license [sic]. Lastly, the Commission entered into a Consent Judgment to afford Livingston Downs yet even more time, two additional years, to rehabilite [sic] and make itself financially able to open and operate race track.

What has Livingston Downs accomplished during those two years? Well, it sued for off track wagering rights, again, irrespective of a Supreme Court decision holding it could not have off track wagering. The litigation was, of course, unsuccessful. It has pursued other merit less litigation throughout the state. Over two years, Livingston Downs has been dismissed as a party and dismissed others it sued.

What Livingston Downs has not accomplished in two years is securing an enforceable, binding commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS for the construction of a racing oval, grandstand and backside in Livingston Parish Louisiana.

The Consent Judgment, made the judgment of the court, provided that upon Livingston Downs failure to accomplish this task within two years this case shall be

dismissed. The trial court appropriately dismissed the suit.

Though Livingston Downs at the conclusion of this litigation will be without a license after six years, it is without a race track. When it has the financial wherewithal to construct, open and operate a race track, it may again apply for a license.

Respectfully submitted:

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By: /s/ Kim Raines Chatelain
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon Counsel for all parties by telefacsimile transmission and/or by mailing the same to each properly addressed and postage prepaid on July 19, 1999.

/s/ Kim Raines Chatelain

APPENDIX E

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

STATE OF LOUISIANA, ET AL.

NO._____

IN RE: LIVINGSTON DOWNS RACING ASSOCIATION, INC. APPLYING FOR SUPERVISORY WRITS DIRECTED TO THE FOURTH CIRCUIT COURT OF APPEAL, DOCKET #99-CA-1001 CONSOLIDATED WITH DOCKET #99-CA-1002 FROM A JUDGMENT GRANTING A MOTION TO DISMISS WITH PREJUDICE THE HONORABLE ROBIN A. GIARRUSSO, JUDGE, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, SUIT NO. 92-20961 C/W 95-15331

CIVIL CASE

Respectfully submitted:

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WRIT GRANT CONSIDERATIONS

The Fourth Circuit Court of Appeal erroneously applied the laws of this state to the facts of this case. The Court of Appeal's decision causes substantial injustice to Livingston Downs Racing Association, Inc. ("LDRA") by taking a property right from LDRA, without regard to LDRA's rights to equal protection and due process under both the state and federal constitutions. Moreover, the Court's decision significantly affects the public interest. The Court of Appeal's decision ratifies the actions (or inactions) of the Louisiana State Racing Commission (the "Commission") which are clearly in violation of both the Racing Statutes and the Administrative Procedure Act.

Additionally, the Court of Appeal's decision has so far departed from proper judicial proceedings or so abused its powers, and sanctioned such a departure or abuse by the trial court chat this Court's exercise of its supervisory jurisdiction is warranted. As shown in Section VI herein below, the trial court record of this matter is in such disarray and is so incomplete that it is impossible for an appropriate judicial determination to have been made. Having made such a determination without regard to the record of this matter is clearly a violation of LDRA's due process rights under both the state and federal constitutions.

STATEMENT OF THE CASE

On November 15, 1996 the parties entered into a consent judgment (***Appendix 1***) (hereinafter referred to as the "consent judgment") approved by the trial court which provides in pertinent part:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall frilly cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s)

> or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent judgment was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, Stale of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed.

On August 30, 1996 LDRA named current and former Commission members, Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas, together with Melinda Tucker, former attorney for the Commission, as defendants in a suit filed in U.S. District Court, Middle District of Louisiana captioned *Livingston Downs Racing Association, Inc. v. Jefferson Downs Corporation, et al.*, Civil Action No. 96-3430-C-M1. Among the allegations contained in the petition were conspiracy to violate anti-trust, restraint of trade and § 1983 Civil

Rights violations for illegal actions under color of state law.

Shortly thereafter, the Commission defendants approached LDRA to discuss a resolution of the issues. LDRA had no desire to harm individual members of the Commission. LDRA's only desire was to move forward with its efforts to build its race track project. LDRA only wanted the Commission to cease its interference, in conjunction with the Fair Grounds (who has admitted this collusion in pleadings filed with the federal court), with LDRA's efforts to build its race track project in violation of the racing statutes and LDRA's constitutionally protected rights to equal protection and due process. LDRA's reasoning was that if the Commission would not follow its mandate under the racing statutes to assist LDRA in its efforts, then it at least should not cause further interference and delays. With these objectives in mind, LDRA negotiated the consent judgment, and in return dismissed the Commission defendants from the federal lawsuit.

Had the parties not entered into a consent judgment, the issue of the license revocation would have proceeded to trial on the merits in Judge Giarrusso's court. The record and law clearly supports LDRA's position. Furthermore, the Commission would have faced an expensive trial in federal court, with significant exposure to personal monetary damages. LDRA negotiated the consent judgment in good faith. It is now apparent that the Commission members, on the other hand, secured a release to their benefit and simply waited for the appropriate time and opportunity to again work in conjunction with other federal defendants to keep LDRA from building its race track project. The Commission's actions which

are the subject of this writ are purely retaliatory to punish LDRA for daring to stand up for its rights.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish. This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of live horse racing in Livingston Parish.

As soon as the dismissal was ordered, LDRA sent a written request to the Commission for an extension of the October 31, 1998 deadline contained in the consent judgment. On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. A meeting notice was forwarded to Mr. Bursavich.

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission

did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. This is in violation of the Administrative Procedure Act.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on LDRA's request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, the Commission arbitrarily and capriciously rejected said commitment without even communicating with the lender or LDRA. The action of the Commission is in direct violation of the Administrative Procedure Act, is in bad faith, violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

Then, on November 10, 1998 the Commission filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter timely. However, the Commission has not even acknowledged receipt of said commitment (other than date and time stamp by its Executive Director on October 30, 1998) or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before the trial court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarusso's office and was advised

by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and advise that LDRA would be allowed oral argument on the motion.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on December 4, 1998, a contradictory hearing did not take place. Despite the fact numerous exceptions were filed by LDRA, along with a petition for writ of mandamus and a motion to enforce section 16 of the consent judgment, the hearing lasted less than ten minutes. After a brief opening statement by counsel for the Commission, Judge Giarrusso recognized Mr. Victor Sachse, III, counsel for LDRA. Mr. Sachse noted that Mr. Paul Burgess, Executive Director of the Commission, and Ms. Kim Chatelain, counsel for the Commission, were present. Mr. Sachse requested that the Judge issue an instanter subpoena to these two parties in order to establish that there had been no official action taken by the Commission which authorized the filing of the subject motion to dismiss. Judge Giarrusso responded by advising Mr. Sachse that he could get them (the subpoenas) from the Fourth Circuit because she was granting the motion to dismiss. Judge Giarrusso advised Ms. Chatelain to draw up the order and that she would sign the order the same day. Gavel down, hearing over, order signed within hours.

The trial court's refusal to permit LDRA to participate in a proceeding in open court and to present its case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of LDRA's

right to free access to the courts under La. Const. Art. I, Section 22. LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then the party's rights under Art. I Section 19 are violated.

In addition to the trial court's actions, LDRA filed three separate motions requesting that the Court of Appeal direct the Clerk of Court for the Parish of Orleans to complete the record on appeal, all of which are a part of the appellate record. The Court of Appeal twice ordered the appellate record supplemented. However, at noon on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion requesting that the Court of Appeal direct the Civil District Clerk to complete the appellate record and also filed a motion to withhold submission of the case until the record was complete. At the oral argument before the Court of Appeal, the panel stated that it would address the matter of the incomplete record at a later date. Undersigned counsel never received any notification that the motions were acted upon.

Among the pleadings missing from the record herein are the following which are germane to the motion to

dismiss filed by the Commission which is the subject of the instant appeal:

a. Consent Judgment between the parties filed on November 15, 1996.

b. The Commission's motion to dismiss filed on November 10, 1998.

c. LDRA's motion to continue hearing on the Commission's motion to dismiss filed November 18, 1998.

d. The Commission's opposition to LDRA's motion to continue hearing filed November 23, 1998.

e. The trial court's November 30, 1998 order denying LDRA's motion to continue.

f. LDRA's opposition to the Commission's motion to dismiss filed on December 1, 1998.

g. LDRA's motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

h. LDRA's memorandum in support of motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

i. LDRA's dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

j. LDRA's memorandum in support of dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

k. LDRA's petition for writ of mandamus filed on December 3, 1998.

l. The Commission's motion and incorporated memorandum to quash request for production of documents filed on December 4, 1998.

m. LDRA's petition for suspensive appeal filed on December 21, 1998.

n. LDRA's notice of intent to apply for writs filed on December 21, 1998.

o. Trial Court's December 21, 1998 order granting LDRA's suspensive appeal filed on December 21, 1998.

p. LDRA's motion to limit the record on appeal filed on January 20, 1999.

q. Court's notice of estimated appeal cost filed February 8, 1999.

The Civil District Clerk failed to even supplement the record with these seventeen documents which are required for the trial court, the appeal court and this Honorable Court to render a decision.

Moreover, the record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, which the Commission supplemented with this Court, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the Commission, nor does it contain LDRA's attempts to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so. LDRA even offered, in both its second and third motion to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate court, if necessary.

LDRA has made every attempt to have a complete record before this Court. Without a complete record, its constitutional rights under Article 1, Section 19 of the Louisiana Constitution are being violated.

ASSIGNMENTS OF ERROR

1. The trial court and the appellate court erred in addressing the settlement agreement between the parties which was not a part of the proceedings and therefore was not properly before the courts.

2. The trial court and the appellate court erred in failing to take cognizance of pertinent provisions of the consent judgment which control this appeal.

3. The appellate court erred in ruling that the issue of whether the Commission properly revoked LDRA's license was rendered moot by the consent judgment.

4. The trial court and the appellate court erred by failing to find that LDRA timely filed its application and commitment letter in accordance with Sections 4 and 6 of the consent judgment.

5. The trial court and the appellate court erred in finding that no action by the Commission was required regarding LDRA's application when action by the Commission was expressly provided for in the consent judgment.

6. The appellate court erred in affirming the trial court's granting of the Commission's motion to dismiss when the trial court did not properly conduct a contradictory hearing as required by the Louisiana Code of Civil Procedure.

7. The appellate court erred in failing to require the trial court to conduct a contradictory hearing on the exception of prematurity, motion and writ of mandamus filed by LDRA.

8. The appellate court erred in affirming the actions of the trial court when such actions clearly denied LDRA's constitutional right to due process, as well as its constitutional right to be secure in its property granted under both the state and federal constitutions.

9. The appellate court erred in affirming the trial court's decision in rendering a judgment in this matter when both the administrative record and the record on appeal were so grossly incomplete as to violate LDRA's right to due process under both the state and federal constitutions.

10. The appellate court erred in ruling on the merits of the original appeal as well as affirming the trial court's dismissal on December 4, 1998 when the record, if accurate and complete, clearly shows that the Commission failed to follow the racing statutes, Open Meetings Law and the Administrative Procedure Act and violated LDRA's right to due process, as well as its constitutional right to be secure in its property granted under both the state and federal constitutions.

11. The trial court and the appellate court erred in finding that LDRA did not properly disclose ownership at the time its application was submitted to the Commission.

12. The trial court and the appellate court erred in failing to find that the Commission violated both the spirit and the letter of the statutes enacted to set forth the legislative intent and the

procedures which the Commission must follow regarding licenses issued to racing associations.

13. The appellate court erred in affirming the trial court's granting the Commission's motion to dismiss when said motion was premature.

SUMMARY OF THE ARGUMENT

For the reasons set forth herein below, LDRA hereby applies for writ of certiorari or review with this Honorable Court from the decision rendered February 16, 2000 (***Appendix* 2**) and the denial of LDRA's application for rehearing on March 16, 2000 (***Appendix* 3**). The Court of Appeal's decision affirmed the trial court's judgment dismissing LDRA's suspensive appeal of the Commission's April 29, 1994 revocation of LDRA's licenses (***Appendix* 4**). The Court of Appeal's decision is based on incomplete facts and when all pertinent facts are considered, is factually and legally incorrect. LDRA respectfully urges that a careful examination by this Honorable Court is warranted.

On careful review of the Court of Appeal's February 16, 2000 opinion in this matter, it is clear that the material facts in support of the Court of Appeal's legal conclusions are incorrect. Moreover, the record was so far from complete that it placed the Court of Appeal at a distinct disadvantage in ascertaining all material facts relating to this matter. The state of the record is more fully addressed in Section VI, herein below.

ARGUMENT OF ASSIGNMENTS OF ERROR

MAY IT PLEASE THE COURT:

I. The settlement agreement between the parties was not properly before this Honorable Court.

Page 2 of the Court of Appeal's decision states "to avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996." The settlement agreement and the consent judgment dealt with totally separate and distinct issues. The settlement agreement encompassed the entirety of the agreements made between the parties regarding multiple litigation. The consent judgment executed between the parties on November 15, 1996 was but one issue of six different issues between the parties that are outlined in the settlement agreement executed on November 15, 1996. The only issue in the settlement agreement regarding the instant litigation is "the parties agree to obtain a consent decree in the matter entitled "Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission," No. 92-20961 c/w 95-15331, Civil District Court for the Parish of Orleans in the form annexed as *Appendix A*." The intent of the parties regarding the instant litigation is set forth in the consent judgment which is (or should be) a part of the record of this matter. The settlement agreement is not part of the record of this matter and is not indicative of the intent of the parties with respect to this litigation. Moreover, as the settlement agreement was not part of the record at the trial court, it should not have been a factor in the Court of Appeal's decision because it was not properly before the court.

II. Neither the trial court nor the Court of Appeal took cognizance of pertinent provisions of the consent judgment, which control this appeal; the issue of whether the Commission properly revoked LDRA's license was not rendered moot by the consent judgment.

The Court of Appeal stated on page 2 of its February 16, 2000 decision, "the specific paragraphs of the consent judgment pertinent to this appeal read as follows: . . . " Paragraphs 6, 7, 8, 9, 15, 16 and 18 are enumerated therein. Apparently, however, neither the trial court nor the Court of Appeal took cognizance of the significance of paragraphs 1, 2 and 4 which state:

> 1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.
>
> 2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.
>
> 4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

The issue of whether the Commission properly revoked LDRA's license without cause was not rendered moot when the parties entered into the consent judgment. In fact, the consent judgment expressly states the opposite. Paragraphs 1 and 2 of the consent judgment clearly contemplate, the continuation of this litigation. Furthermore, the aforementioned paragraphs in the consent judgment clearly mandate action by the Commission upon timely receipt of LDRA's application. LDRA timely filed its application on October 30, 1998.

III. LDRA timely filed an application and commitment letter in accordance with Sections 4 and 6 of the consent judgment.

On Friday, October 30, 1998 at 9:35 a.m., LDRA hand delivered the following documents to the Commission office in New Orleans, Louisiana: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2) a financial statement of Livingston Downs Racing Association, L.L.C.; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for Collateralized Mortgage Financing" issued by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc. Copies of these documents were attached as Exhibit 1, *in globo*, to LDRA's opposition to the Commission's motion to dismiss, and therefore, are or should be a part of the record on appeal. Contrary to the Court of Appeal's findings of fact (page 4 of the Court's opinion), the Commission did not receive these documents via fax, but by hand delivery. Paul Burgess, Executive Director of the Commission at that time, attested to the receipt of

these documents by affixing his signature, along with the date and time of receipt to the face of said documents. The Court of Appeal erroneously states on page 7 of its opinion that it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page. As stated hereinabove, this is simply not true.

IV. Action by the Commission was expressly provided for in the consent judgment.

The Court of Appeal further stated on page 6 "once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment." However, the reverse is true. Once the application and commitment letter were filed by LDRA with the Commission, then the Commission was mandated by the consent judgment to perform the action provided for in the consent judgment, namely conduct an investigation of LDRA's funding sources and act upon the application. Paragraphs 4 and 15 expressly provide for action by the Commission. The manner in which the Commission is authorized to take action is dictated by LSA-R.S. 4:151, et seq. and LSA-R.S. 49:961, et seq. The Court of Appeal ruled on page 5 of its opinion that the Administrative Procedure Act applies to actions by the Commission. However, the Commission failed to act pursuant to the Administrative Procedure Act.

The Consent Judgment provided that LDRA would file an application on or before October 31, 1998. The application had to include an enforceable commitment

letter in the amount of ten million dollars. The Commission then had the ***duty*** to investigate the source of LDRA's funding. Upon completion of its investigation the Commission was required to promptly act upon the application. Or, as Paragraph 4 of the Consent Judgment states, "the Commission SHALL consider an application" [to be filed by LDRA]. (emphasis supplied).

The Court of Appeal's primary focus is whether LDRA complied with the terms of the consent judgment in the filing of its application. Among other things, the Court is basing its decision on semantics (i.e., the fact that the commitment has the word "conditional" in its title and the fact that the commitment does not use the magic words "in an amount not less than ten million ($10,000,000.00) Dollars"). This does not alter the fact that LDRA complied with the consent judgment and filed an application on or before October 31, 1998 together with a commitment letter in the amount of $10,000,000.00.

In *Birchard v. State Bd. of Medical Examiners*, 609 So.2d 980 (La. App. 4th Cir. 1992), Birchard appealed from the board's refusal to grant him permission to practice medicine at a certain hospital, without first giving him a hearing. The board had previously revoked Birchard's license but authorized him to "practice medicine only as an employee of a medical institution approved in advance by the board." The Fourth Circuit found that Birchard had not appealed the decision revoking his license or placing this condition on him. The court found that Birchard was appealing only from the procedure the board used to enforce its decision not to allow him to practice at a certain hospital. The court went on to state "there was nothing in the wording of the 'prior approval'

condition of probation to even remotely suggest to Dr. Birchard that he would be entitled to a hearing each time the Board exercised its approval process. He had no reason to expect anything other than the unilateral action of the Board in the enforcement of that condition of probation . . . "

In the present case once an application containing a ten million dollar commitment was filed with the Commission, it had no unilateral right to do anything other than conduct an investigation and convene an open meeting pursuant to the Administrative Procedure Act and LSA-R.S. 4:141, et seq. to issue a ruling on the LDRA application.

In *Ensenat v. Bd. of Medical Examiners,* 593 So.2d 929 (La. App. 4 Cir. 1992) Dr. Ensenat was brought before the board on various charges. At the hearing he entered into a consent order revoking his license to practice medicine and waiving his right to seek reinstatement for a period of five years. After five years he could seek reinstatement but reinstatement would depend solely upon the discretion of the board. When Dr. Ensenat sought unconditional reinstatement the board offered only conditional reinstatement Ensenat then filed suit to compel the board to reinstate his license to practice medicine or to afford him a full hearing on his application for reinstatement.

The Fourth Circuit found that the consent agreement did not give Ensenat the legal right to reinstatment. In regard to Ensenat's argument that due process required the board to grant him a hearing the court stated at page 933 that:

> Dr. Ensenat's possession of a medical license gives him a vested property interest, which guarantees him a right to due process prior to revocation of that license. However, by virtue of the 1976 consent order, that property interest was properly extinguished by due process of law, and Dr. Ensenat does not claim otherwise.

In the present case LDRA's possession of a license, even if suspended, gives it a vested property interest, which guarantees it a right to due process prior to being deprived of that license. The consent judgment expressly contemplates and expressly provides that a hearing be held by the Commission upon LDRA filing an application with a ten million dollar enforceable commitment by October 31, 1998. LDRA filed its application together with a signed ten million dollar enforceable commitment on October 30, 1998. Under the consent judgment, LSA-R.S. 4:158 and the Administrative Procedure Act, the ball was then in the Commission's court for it to conduct an investigation and hold a hearing. It did niether [sic].

R. S. 4:158 provides that "the Commission ***shall convene*** to consider the refusal or granting of the permits or licenses applied for." The procedure used by the Commission must afford an applicant a fair and proper opportunity to present the merits of the request and to have a determination made after the request is considered. A procedure devoid of staff reports and studies or sworn testimony, and no opportunity for interested parties to confront and cross examine violates due process and "is not at all consistent with the letter or the spirit of the administrative procedure act." *Jefferson Downs v. La. State Racing Com'n*, 288 So.2d 653, (La. App. 4 Cir. 1974).

In the present case the Commission never convened a hearing to consider the application, much less conduct a proper hearing.

The Court of Appeal stated on page 5 of its opinion that "once the consent judgment and settlement were approved and entered into in accordance with the Open Meetings Law and Administrative Procedure Act, the parties were bound by the provisions of the consent judgment, over which the trial court expressly retained jurisdiction." Yet, the Court further stated that "nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment." Incredibly, in the same opinion, the Court of Appeal also stated, on page 6, that "pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely." This contemplates action by the ***full commission***. Furthermore, until the Commission issues an official ruling regarding the LDRA application any action filed pursuant to paragraph 15 of the consent judgment is premature.

It is well settled that a representative of a legal entity cannot act without special authorization. For example, the president of a corporation may not sue in the name of the corporation without special authorization from the board of directors to bring the suit. See *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So.2d 660 (La. 1912). In the present case there is no evidence in the record that the Commission gave special authorization to its legal counsel, either in the consent judgment or in an open meeting,

to proceed to act on the application. Absent such special authorization, the Commission's legal counsel had no authority to act on her own. Moreover, pursuant to Paragraph 18 of the Consent Judgment, the trial court retained jurisdiction ***only*** over the enforcement of the consent judgment. Paragraphs 4, 5, 7, 8, 9, 10, 11, 12, 16, and 17 ***clearly*** contemplate and mandate action by the Commission with respect to LDRA's application filed on October 30, 1998.

V. The trial court did not conduct a contradictory hearing, as contemplated by the Louisiana Code of Civil Procedure; LDRA was denied its constitutional right to due process under the state and federal constitutions as well as its constitutional right to he secure in its property without due process of law.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on, December 4, 1998, a contradictory hearing did not take place. LDRA refers this Court to its statement of facts hereinabove. Moreover, the trial court did not transcribe any portion of this so-called contradictory hearing. There was no contradictory hearing as found by the Court of Appeal on page 5 of its opinion. The refusal of a trial court to permit a party to participate in a proceeding in open court and to present that party's case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of that party's right to free access to the courts under La. Const. Art. I, Section 22. *Zarek vs. Sanders*, 656 So.2d 1038 (La. App. 5 Cir. 1994). Substantive due process is involved in claims in which action by a

state or local government interferes with property interests in an arbitrary or capricious manner. *Standards Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1 Cir. 9/23/97, 700 So.2d 975.

La. Const. Art. 1, Section 19 provides provides that "no person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based . . . " This provision is not limited to criminal convictions or forfeitures. See, *Walker v. Stewards of Jefferson Downs Race Track*, 615 So. 2d 403, (La. App. 4 Cir. 1993), and *Something Irish Co. V. Rack*, 333 So.2d 773, (La. App. 1 Cir. 1976).

LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then that party's rights under Art. 1 Section 19 are violated. *State v. Clark*, 93-0321 (La. App. 4 Cir. 10/27/94), 644 So.2d 1130, writ denied 94-2884 (La. 3/24/95), 651 So.2d 287.

La. Const. Art 1, Section 22 provides that "all courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." This provision is a mandate to the judiciary. *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986). See also *Zarek v. Sanders*, supra.

The Court of Appeal stated that if LDRA was aggrieved by the Commission's ruling or failure to act pursuant to Paragraph 16, it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the Court for appropriate relief. The Court of Appeal's own ruling contains conflicting opinions. In this section, the Court of Appeal refers to the "Racing Commission's ruling." In order for the Commission to rule, it had to conduct a meeting pursuant to the Open Meetings Law and the Administrative Procedure Act. This was not done. The Court of Appeal said that it was not necessary under the consent judgment. However, in another section of the Court of Appeal's opinion, the Court said the Administrative Procedure Act applied to the Commission. The Court of Appeal's ruling is contradictory.

LDRA could not seek judicial review by summary proceeding since the Commission failed to make an adjudication. The Commission never acted upon LDRA's application. LDRA filed a motion to enforce Paragraph 16 of the consent judgment. That motion, as well as all of the exceptions and a writ of mandamus filed by LDRA (see Section VI herein below), were never heard or considered in the trial court. A terse statement to the effect that "the motion of the Commission is granted and this suit is dismissed" without hearing evidence or oral argument from the parties is a clear violation, under the circumstances of the case, of La. Const. Art. 1, Section 22.

A recent decision of the First Circuit clearly addresses the requirement that the full record be available for review. In *Ford v. Louisiana Department of Public Safety and Corrections*, 96-2617 (La. App. 1st Cir. 12/28/99) 749 So.2d 910, the court stated:

[1] "Judicial review of a quasi judicial administrative agency action is said to be appellate review." *Johnson v. Department of Corrections*, 97-1891, p. 5 (La. App. 1st Cir. 6/25/99), 738 So.2d 1165, 1167. Therefore, when the district court reviewed this matter, it was sitting as an appellate court. Louisiana Code of Civil Procedure article 2161 states, in part, "[a]n appeal shall not be dismissed because the record is missing, incomplete or in error no matter who is responsible, and the court may remand the case either for retrial or for correction of the record."

Under the Louisiana Administrative Procedure Act, which has been held to be applicable to agency adjudication proceedings of the Department of Corrections, *Nix v. King*, 457 So.2d 805 (La. App. 1st Cir. 1984), the record in a case of adjudication must consist of the following:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered or a resume thereof if not transcribed;

(3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose;

(4) Offers of proof, objections, and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, opinion, or report by the officer presiding at the hearing.

La.R.S. 49:955(E)

As indicated under subsection (2) of the foregoing list, the tape recording of the disciplinary hearings (or at a minimum, a resume of the evidence received at the hearing) constituted part of the record in this case. It would have been error on the part of the district court to have rendered a decision in absence of the evidence provided in the tape recordings.

In *Muggivan v. Jefferson Parish School Board*, 583 So.2d 1157 (La. App. 5th Cir.), *writ denied*, 590 So.2d 66 (La. 1991), the court set aside the judgment of the district court despite the fact that the transcript from the school board hearings lead not been included in the record before the district court. The appellate court found that the hearing before the school board took place over the course of three days, yet the stenographic notes from one of the days had been destroyed, could not be duplicated and therefore were not transcribed. The transcripts for the other two days were available but were not included in the record. The case was remanded with instructions to reconstruct and transcribe, if possible, those portions of the hearing that were destroyed. If this was not possible, then the court ordered that the plaintiff be granted a new trial before the school board.

The record shows that LDRA repeatedly requested that the full record be submitted to the appellate court. It is obvious that in absence of the full record, the courts below adopted the Commission's version of the events, which was either misleading or deliberately false.

On page 7 of its decision, the Court of Appeal *erroneously* ruled that the Commission received a faxed copy of the application and financing commitment, without a

signature page, and that the loan commitment was dated, signed by the borrower and lender and returned on or before November 10, 1998." The Court of Appeal further *erroneously* ruled that it was not until November 12, 1998 that the Commission finally received an original application and a copy of the conditional commitment with the signature page. The record clearly shows that the facsimile application and commitment letter were hand delivered to the Commission office and marked as received at 9:35 a.m. on October 30, 1998. A cover letter (stamped and received) explained that a facsimile of the original signature page, with signatures denoting acceptance by both borrower and lender, was attached and that the original documents would follow via Federal Express on Saturday, October 31, 1998 addressed to the Commission for Monday, November 2, 1998 delivery. The Commission office was closed on Saturday, October 31, 1998. The record will show that the original documents were deposited with Federal Express on Saturday, October 31, 1998 and were received by the Commission on Monday, November 2, 1998. In accordance with LSA-C.C.P. art. 5059, the application was timely filed.

The Court of Appeal further *erroneously* ruled that the Commission followed the Administrative Procedure Act in revoking LDRA's license on April 29, 1994. Even a mere cursory review of the transcript of the April 29, 1994 hearing clearly reveals that the Commission violated the Administrative Procedure Act. Moreover, as noted in LDRA's third motion for the Court of Appeal to direct the Commission to complete the administrative record numerous documents are still not in the record of the

Court of Appeal. A copy of LDRA's third motion is attached hereto as Appendix 4.

The Court of Appeal further *erroneously* ruled that the so-called evidentiary hearing held before the district court satisfied LDRA's due process rights of notice and opportunity to be heard. The record (or absence of record) shows that the hearing lasted less than five minutes and that LDRA was not allowed to present any witnesses, evidence or argument before the motion was granted.

VI. The record on appeal was incomplete; therefore, this Court could not rule on the merits of either the original appeal of the April 29, 1994 license revocation or the appeal from the trial court's dismissal.

LDRA filed three separate motions to order the Clerk of Court for the Parish of Orleans to complete the record on appeal, all of which are a part of the appellate record. The Court of Appeal ordered the appellate record supplemented twice. However, at noon on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion to order the Civil District Clerk to complete the appellate record and a motion to withhold submission of the case until the record was complete. At the oral argument before the Court of Appeal, the panel stated that it would address

the matter of the incomplete record at a later date. Undersigned counsel never received any notification that the motions were acted upon.

Among the pleadings missing from the record herein are those listed in the statement of facts hereinabove which are germane to the motion to dismiss filed by the Commission which is the subject of the instant appeal. The Civil District Clerk failed to even supplement the record with those seventeen documents which were required for the Court of Appeal to render its decision without violating LDRA's due process rights.

Moreover, the record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, which the Commission supplemented with this Court, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the Commission, nor does it contain records relating to LDRA's attempts to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so.

LDRA offered, in both its second and third motion to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate if necessary.

LDRA has made every attempt to have a complete record before this Court. Without a complete record, its constitutional rights under Article 1, Section 19 of the Louisiana Constitution are being violated. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that

right; then that party's rights under Art. 1 Section 19 are violated. *State v. Clark,* supra.

VIII. Ownership in LDRA was properly disclosed at the time the application was submitted.

LDRA complied with the provisions of LSA-R.S. 4:147(4) by properly stating the ownership at the time the application was filed. The commitment provided that at a *later* date LDRA may transfer an ownership interest to parties selected by Remington, at its sole discretion. This clause legally bound only LDRA and Remington. Parties cannot, by contract, supersede slate law. Both Remington and LDRA were aware that they must submit any ownership changes to the Commission for its approval. The Commission still had the power and authority to reject, for just cause, any party submitted by Remington. The Commission had the power to deny Remington's participation until such time as it submitted nominees acceptable to the Commission.

The Court of Appeal, on page 4 of its opinion, addresses the Commission's objections to the application filed in the name of LDRA, LLC. The application was filed by Livingston Downs Racing Association in the name of its **wholly owned subsidiary** to satisfy a condition of the financing agreement. There had been no change in any of the parties to the original LDRA application. It was well within the Commission's discretion to approve the modified application, as it has done for other racing associations prior to and subsequent to LDRA's submission of its application. Had LDRA been allowed to

introduce evidence at the December 4, 1998, the Commission transcripts in which the Commission allowed Louisiana Downs and Evangeline Downs to deviate from its application, would be in the record. LDRA was not allowed to do so. Moreover, had the Commission conducted a hearing as it was mandated to do under R.S. 4:158(B) and the consent judgment, this evidence could and would have been introduced before the Commission. LDRA was not allowed to do either, in violation of its state and federal constitutional rights.

IX. Both the trial court and the Court of Appeal erred in finding that the Commission's actions (or inactions) were not properly before the Court.

The statutes applicable to the facts of this case were not even considered or referenced by the Court of Appeal. The powers and duties of the Commission are specified in part in LSA-R.S. 1:144 which states in pertinent part:

> **§144. State Racing Commission, creation; membership; powers and duties; quorum; qualifications of members; per diem; expenses or disbursement; bond**
>
> A. There is hereby created in the executive branch of state government a racing commission to be known as "Louisiana State Racing Commission." The Commission shall have the powers and duties specified in the past and all other power necessary and proper to enable it to execute fully and effectually all of the objects, purposes, duties and policies of this part. . . . The governor shall select one member of the

commission to serve as chairman . . . *A majority of the members shall constitute a quorum for the transaction of any business or the exercise of any powers.* (Emphasis here and elsewhere unless otherwise stated is ours.)

The powers and duties of the Commission's attorney are clearly defined in LSA-R.S. 4:146 which states in pertinent part:

§146. Attorney for the commission.

A. The attorney general shall designate one of his assistants to act as attorney for the commission, without additional salary, who shall counsel and advise the commission, shall represent it in all legal proceedings, and shall prosecute any violation of the provisions of this part.

LSA-R.S. 4:154 provides that the Commission's hearing practice, procedures and rule making procedures are as provided in the Administrative Procedure Act. There are no provisions in the racing statutes that exempt the Commission from LSA-R.S. 42:4 through 42:13, the Open Meetings Law.

The legislative intent and policy is found in LSA-R.S. 4:141 which states in pertinent part:

§141. Legislative intent and policy.

1. To institute and maintain a program to encourage and permit development of the business of horse racing with pari-mutuel wagering thereon on a high plane.

2. To institute and maintain a program to encourage and permit development of the

breeding and ownership of race horses in the state.

4. To institute and maintain a program to provide financial assistance that will encourage and permit the development of the business of horse racing by licensed horse racing tracks in the state of Louisiana.

LSA-R.S. 4:142 states that the purpose of this chapter is to effectuate the policies set forth in LSA-R.S. 4:141.

LDRA respectfully submits that the actions of the Commission in the instant case violated both the spirit and the letter of the statutes outlined hereinabove.

This Honorable Court recently addressed the issue of legislative intent and actions of an administrative agency in *Jurisich v. Jenkins*, 749 So.2d 597 (La. 1999). The Court states in part:

> [6] While a persuasive indication of the true meaning of a statute is the contemporaneous administrative construction given the statute by an agency charged with administering it, an administrative construction cannot be given effect where it is contrary to or inconsistent with legislative intent. *Sales Tax Dist. No. 1 of LaFourche Parish v. Express Boat Company, 500 So.2d 362 (La. 1987).* An administrative construction cannot have weight where it is contrary to or inconsistent with the statute. *Traigle v. PPG Industries, Inc., 332 So.2d 777, 782 (La. 1976).*
>
> [7] . . . LSA-R.S. 56:425(C) recognizes that the Secretary may "make such stipulations in leases made by him **as he deems necessary and proper** to develop the [oyster] industry" provided that

the clauses are consistent with the statutory provisions of Subpart D.

While the facts of *Jurisich* and this case are not identical, this Honorable Court clearly states that an administrative body's actions must be in furtherance of the legislative intent of the statutes.

The Court of Appeal stated in its decision on page 5 that "nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment." However, such a clause was unnecessary because both the provisions of the consent judgment and operation of the laws outlined herein ***required*** the Commission to meet and discuss the issues. Furthermore, even if the consent judgment stated that it was not necessary for the Commission to hold an open meeting, which is emphatically denied, the terms of a consent judgment cannot override state law. Any such provision would be invalid.

The consent judgment clearly anticipated that both LDRA and the Commission would take certain actions. The record is clear that LDRA complied with the terms of paragraph 6 of the consent judgment by timely filing an application on its own behalf, although in the name of its wholly owned subsidiary, Livingston Downs Racing Association, L.L.C. The application clearly stated that the sole owner of the limited liability company was LDRA (Inc.). Once that application was filed, the Commission had to determine in an open meeting whether that application was acceptable. While the Commission's attorney

may have advised the Commission that LDRA had not met the requirements of the consent judgment, **only the full Commission,** not its chairman, nor any committee, nor its attorney could make a determination regarding an application for racing dates.

It not only was within the power of the Commission to accept this application, but to allow such a technicality to prevent the construction of a race track which would provide thousands of jobs and generate millions of revenue for state and local governments would be a direct abrogation of the mandate of the legislature as expressed in LSA-R.S. 4:141.

When viewed in the standards of *Jurisich,* supra, the Commission should have worked with LDRA to resolve any technical differences in the application and to resolve any problems it may have had with the loan commitment. Instead, the Commission did not even meet to discuss the issue. The arguments of the Commission in its motion to dismiss reflect only the opinion of its counsel. In filing the motion to dismiss, counsel not only exceeded her authority, but acted without any authority whatsoever within the Louisiana Revised Statutes. For this Court to rule otherwise would set a dangerous precedent. The attorney for the Commission cannot substitute her judgment for that of the Commission. The record is clear that the Commission did not meet to consider the application and financing commitment submitted by LDRA. (To this date, the Commission has not acted on the application nor has it returned LDRA's $5,000.00 application deposit.) The Commission did not rule on LDRA's application. The full Commission did not authorize the filing of the motion to dismiss, therefore, the motion was improperly

before the court. Even if it had, the motion is premature until the Commission acts in open meeting upon LDRA's application. Moreover, once LDRA filed its application and commitment letter, paragraph 15 was no longer applicable, therefore, the Commission did not have the right to file the motion to dismiss. The Commission was then bound to take action in accordance with paragraphs 7, 8 and 9 of the consent judgment. Since the Commission failed to take any of the official actions prescribed by law, the Commission violated the consent judgment and paragraph 16 of the consent judgment is controlling.

CONCLUSION

The Court of Appeal's ruling contains conflicting opinions regarding the Commission's jurisdiction to grant or deny the license application filed by LDRA. Moreover, the ruling contains conflicting legal conclusions based on erroneous and/or incomplete facts. For the foregoing reasons, LDRA respectfully applies for writs of certiorari or review with this Honorable Court from the decision rendered February 16, 2000 and subsequent denial of LDRA's application for rehearing on March 16, 2000 in the above entitled and numbered cause.

This case involves substantial legal issues which seriously impact not only LDRA and the Louisiana racing industry, but also all state administrative agencies. The erroneous ruling of the Fourth Circuit Court of Appeal sets a dangerous precedent for denying rights of individual which are protected under both the state and federal constitutions. It is absolutely necessary that the courts have a full and complete record upon which to base

decisions. The interests of justice dictates that the decision of the Fourth Circuit Court of Appeal be reversed. LDRA respectfully requests that this Honorable Court void the consent judgment based upon the Commission's failure to comply with its provisions and remand this case to the trial court in order that discovery can be completed and a trial on the merits conducted on LDRA's suspensive appeal of the April 29, 1994 license revocation by the Commission. In the alternative, and only in the alternative, this case should be remanded to the Commission in order that it may take action on LDRA's October 30, 1998 application in accordance with the racing statutes, the Open Meetings Law and the Administrative Procedure Act.

Respectfully submitted:

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AND
J. Marvin Montgomery
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VERIFICATION

BEFORE ME, the undersigned Notary Public, in and for the Parish of East Baton Rouge, personally came and appeared:

Darlene S. Ransome

who, after being duly sworn did depose and state:

Along with co-counsel, Breazeale, Sachse & Wilson, L.L.P. and J. Marvin Montgomery, she has prepared the foregoing Writ Application and that the allegations of the Writ Application are true to the best of her knowledge, information and belief.

She does hereby certify that the Fourth Circuit Court of Appeal, Honorable Robin A. Giarrusso, District Court Judge, and opposing counsel, Kim R. Chatelain, have this day been sent a copy of this Writ Application by U. S. mail, postage prepaid and properly addressed.

/s/ Darlene S. Ransome
Darlene S. Ransome

Thus sworn and subscribed before me, Notary Public on the 14th day of April, 2000.

/s/ Catheryn Clainsee-Kojis
Notary Public

Exhibit Appendix 1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

SECTION 11

DIVISION "G"

NOS. 92-20961 c/w
95-15331

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

CONSENT JUDGMENT

(Filed Nov. 15, 1996)

This matter came before the Court on the consent of the parties.

Considering the law and the evidence, the stipulations and consent of the parties, and the arguments of their counsel, the court determining that this judgment should issue on the consent of the parties as evidenced by their signatures hereon,

1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the pendency of the Stay of these proceedings the ten year license issued to Livingston Downs Racing Association, Inc. on May 27, 1993 and licenses to conduct live race meetings previously issued to Livingston Downs Racing Association, Then by the Louisiana State Racing Commission are suspended, and the Commission shall not, except as hereinafter provided in this Consent Judgment, be required to consider the plaintiff as a licensed association. The parties acknowledge the finality of the judgment of the court of Appeal – Fourth Circuit in proceedings **Jefferson Downs v State Racing Commission**, #94-2235, 637 So2d 1279 (La. App. 4 Cir. 1994) regarding the permit issued to the plaintiff pursuant to La. R.S. 4:181 on December 10, 1992.

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any dates for which Livingston Downs Racing Association, Inc. may apply to conduct a live race meeting shall be restricted as follows: (1) for thoroughbred racing; for the period after the traditional close of the Evangeline Downs live race meeting until the traditional opening of the Fair Grounds live race meeting, and

(2) for quarterhorse racing: for the period of November through April. Provided however, nothing contained herein shall prevent the Commission from awarding to Livingston Downs Racing Association, Inc. other racing dates which may become available if such dates are requested by Livingston Downs Racing Association, Inc.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4) (a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act

upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

10. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall include simulcasting rights as conferred upon other licenses associations pursuant to La. R.S. 4:149.2, which rights may only be exercised by the licensee so long as it conducts live horse racing for not less than eighty racing days within a twenty consecutive week period at the facility designated in its license. The § 149.2 simulcasting rights currently enjoyed by licensed associations under current rules, regulations, policies and practices of the Commission include year-round simulcasting of out-of-state races at the racing facilities of the licensees.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall not include simulcasting rights as conferred upon other licensed associations pursuant to La. R.S. 4:211 et seq., including but not limited to § 214(D). However, this

Consent Judgment would not prohibit Livingston Downs Racing Association, Inc. from applying for licensing under §§ 211 et seq. in the event of a final decision of the Louisiana Supreme Court favorable to it in the matter on appeal to that court from the 19th Judicial District Court for the Parish of East Baton Rouge in proceedings numbered 399,563 entitled **Livingston Downs Racing Association, Inc. v The State of Louisiana (Edwards), et al.**

12. IT IS FURTHERED ORDERED, ADJUDGED AND DECREED that, within the delays indicated below from the date of the issuance of its ten year license by the Commission, Livingston Downs Racing Association, Inc. shall make substantial progress toward the completion of the following matters by the times set forth, and failure to make substantial progress by such times may constitute "just cause" for the suspension or withdrawal of the license by the Commission.

(a) sixty (6) days: submission of an up-to-date business plan to the Commission.

(b) eighteen (18) months: submission of final architectural and engineering plans for the racing facility, bid specifications, and building permits, and environmental and wetlands clearances to the Commission.

(c) two (2) years: awarding of the construction contract for the racing facility and filing construction contract with the Commission.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within four (4) years from the date of the issuance of its ten year license by the Commission, or by August 31, 2003, whichever is later, Livingston Downs

Racing Association, Inc. shall file with the Commission (1) a true copy of the affidavit of substantial completion and acceptance of the property by the owner, (2) its first condition book as provided for in Rules of Racing 35:III.5729, and (3) its list of employees and officials as provided for in Rules of Racing 35:III.5701, and failure to do so by such time may constitute "just cause" for the suspension or withdrawal [sic] the license by the Commission.

14. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event of delays in construction, which are caused by labor strikes, material shortages, acts of God or of war, then the Court may grant reasonable extensions of the times established in the preceeding numbers 12 and 13, if the parties have been unable to agree upon such extensions.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs

Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

17. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall afford Livingston Downs Racing Association, Inc. on or about April 15th and on or about August 15th of 1997 and 1998 notice of any requests for racing dates which may conflict with those to be sought by Livingston Downs Racing Association, Inc. and shall consider any objections which plaintiff may have to the granting of such dates to any other association.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

JUDGMENT READ, RENDERED AND SIGNED this 15 day of November, 1996 at New Orleans, Louisiana.

/s/ (Sgd.) Robin M. Giarrusso
JUDGE

Consented to and submitted by:

FOR THE PLAINTIFF, LIVINGSTON DOWNS RACING ASSOCIATION, INC.
By: /s/ Al J. Ransome
Al J. Ransome, President
By: /s/ Darlene S. Ransome
Darlene S. Ransome, Esq.
LSBA # 21983
Counsel

By: /s/ Victor A. Sachse, III
Victor A. Sachse, III, Esq.
LSBA # 11645
Counsel

FOR THE DEFENDANT, LOUISIANA STATE RACING COMMISSION
By: /s/ Albert M. Stall
Albert M. Stall, Chairman
By: /s/ Paul A. Bonin
Paul A. Bonin
Assistant Attorney General
LSBA # 3211
Counsel

EXHIBIT

Appendix 2

JEFFERSON DOWNS CORPORATION, INC. ET AL.	*	**NO. 99-CA-1001**
	*	**C/W**
VERSUS	*	**NO. 99-CA-1002**
	*	
LOUISIANA STATE RACING COMMISSION	*	**COURT OF APPEAL FOURTH CIRCUIT STATE OF LOUISIANA**
	*	
CONSOLIDATED WITH	*	
LIVINGSTON DOWNS RACING ASSOCIATION	*	
	*	
VERSUS	*	
	*	
LOUISIANA STATE RACING COMMISSION	*	

* * *

APPEAL FROM
CIVIL DISTRICT COURT, PARISH OF ORLEANS
NOS. 92-20961 C/W 95-15331, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE

* * *

MOON LANDRIEU
JUDGE

* * *

(Court composed of Judge Charles R. Jones, Judge Moon Landrieu, Judge Dennis R. Bagneris, Sr.)

RICHARD P. IEYOUB
ATTORNEY GENERAL – STATE OF LOUISIANA
KIM RAINES CHATELAIN
ASSISTANT ATTORNEY GENERAL –
STATE OF LOUISIANA
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AND
VICTOR A. SACHSE, III
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AND
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COUNSEL FOR PLAINTIFF/APPELLANT

AFFIRMED

Livingston Downs Racing Association, Inc. ("Livingston Downs") appeals from a trial court judgment dismissing its suit against the Louisiana State Racing Commission ("Racing Commission"). The trial judge dismissed the suit, finding Livingston Downs failed to comply with the terms of a consent judgment that the parties had entered into on November 15, 1996. We affirm the judgment of the trial court.

At its meeting held on April 29, 1994, the Racing Commission revoked Livingston Downs' ten-year license to conduct race meets. Livingston Downs filed a petition for judicial review of the Racing Commission's action in the Twenty-First Judicial District Court for the Parish of Livingston. By judgment of the Louisiana Supreme Court the matter was transferred to Civil District Court for the Parish of Orleans pursuant to La. R.S. 4:145.1. The case was then consolidated with a related matter, *Jefferson Downs, et al. v. Louisiana State Racing Commission*, No. 92-20961, Division G, Orleans Parish Civil District Court. After the trial court dismissed the suit as untimely, Livingston Downs petitioned Civil District Court for a suspensive appeal. The trial court denied the suspensive appeal but granted a devolutive appeal. Livingston Downs subsequently filed a writ application to this Court. We granted the writ application and remanded the matter for the granting of a suspensive appeal in *Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission*, 96-1215 (La. App. 4 Cir. 6/5/96), 675 So. 2d 1214, *writ denied*, 9601750 (La. 9/3/96), 678 So. 2d 558.

To avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996. The consent judgment suspended Livingston Downs' license for two years and further provided that within two years Livingston Downs had to submit a new application which included a binding, enforceable commitment letter(s) in an amount not less than ten million dollars ($10,000,000.00) for the construction of a racing facility, oval and backside or the case would be dismissed. The specific paragraphs of the consent judgment pertinent to this appeal read as follows:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.
>
> 7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc., other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the finding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year

license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

By terms of the settlement agreement, Livingston Downs and the Racing Commission settled other litigation affecting both parties and individual past members of the Racing Commission. Both the consent judgment and settlement agreement were approved at an open meeting pursuant to Louisiana's Open Meeting Law, La. R.S. 42:4.1 *et seq.*, which was conducted in accordance with the Administrative Procedure Act, La. R.S. 49:950. *et seq.*

As the deadline approached, Livingston Downs sent a letter to the Racing Commission requesting a one-year extension. The Commission considered the request at an executive session convened in an open meeting on September 26, 1998, and, shortly thereafter, responded to the request by letter stating that it was committed to abide by the terms of the consent judgment as entered into by the parties.

On October 30, 1998, the Commission received via fax the following documents: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2)

a financial statement of Livingston Downs Racing Association, L.L.C; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for collaterlized Mortgage Financing" by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc.

On November 10, 1998, the Racing Commission filed a motion to dismiss Livingston Downs' suit, arguing that Livingston Downs failed to satisfy the terms and conditions of the consent judgment. Specifically, it argued that the Conditional commitment for collaterlized Mortgage Financing was not a binding, enforceable commitment in an amount not less than ten million dollars. It also argued that contrary to La. R.S. 4:147(4) the conditional commitment allowed for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group. The Racing Commission also objected to the application because it was in the name of Livingston Downs Racing Association, L.L.C. rather than Livingston Downs Racing Association, Inc., the named plaintiff in the suit and consent judgment.

After a contradictory hearing the trial judge dismissed Livingston Downs' suit with prejudice at its cost pursuant to the November 15, 1996 consent judgment.

On appeal, Livingston Downs argues the trial court erred in dismissing its suit for two reasons. First, it contends the Racing Commission failed to take official action to authorize the filing of the motion to dismiss in violation of the Open Meeting Law. Second, it contends the Commission failed to follow the procedures set forth under the Administrative Procedure Act relevant to the

revocation of a license and the conduct of adjudicatory proceedings. The Racing Commission, on the other hand, argues the only issue on appeal is whether the trial court was correct in finding Livingston Downs had not complied with the consent judgment.

Livingston Downs is correct that the Administrative Procedure Act and Open Meeting Law apply to actions taken by the Racing Commission. The record indicates that the Racing Commission complied with these statutes when it initially revoked Livingston Downs' ten-year license at an open meeting on April 29, 1994 in Bossier City and when it later approved the consent judgment and concurrent settlement agreement on November 15, 1996. Once the consent judgment and settlement were approved and entered into in accordance with the Open Meeting Law and Administrative Procedure Act, the parties were bound by the provision of the consent judgment, over which the trial court expressly retained jurisdiction. Nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment.

Livingston Downs' argument that the granting of the Racing Commission's motion to dismiss was an improper adjudication of its license is without merit. The Racing Commission initially adjudicated Livingston Downs' license on April 29, 1994 when it revoked the ten-year license for failure to fulfill the purpose of which the license was granted. The issue of whether the Racing Commission revoked the license without cause, as Livingston Downs' argued in its suit, was rendered moot

when the parties entered into the consent judgment and the Racing Commission agreed to suspend the license for two years to allow Livingston Downs to rehabilitate itself. Once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment.

By its terms, the consent judgment anticipated three possible conclusions to the litigation: 1) Livingston Downs timely filed the application including the binding, enforceable commitment letter and the Racing Commission approved the application; 2) Livingston Downs failed to file a timely application including a binding, enforceable commitment letter; and, 3) Livingston Downs timely filed an application with the binding, enforceable commitment letter but the Racing Commission failed to approve or act upon it. In any of these events, the consent judgment clearly provided for a remedy in the district court. Pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely. If Livingston Downs' was aggrieved by the Racing Commission's ruling or failure to act, pursuant to paragraph 16 it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the court for appropriate relief.

The issue before the district court at the hearing on the motion to dismiss was whether Livingston Downs timely filed an application and commitment letter in accordance with the terms of the consent judgment. Whether the trial court considered the issue on the motion to dismiss by the Racing Commission or on a

petition by Livingston Downs, it is clear from the record the court considered the issue in a contradictory hearing. In view of this, Livingston Downs cannot argue its license was adjudicated without notice and the opportunity to be heard.

We now address whether the trial judge erred in finding Livingston Downs failed to comply with the terms of the consent judgment.

Under the terms of the consent judgment Livingston Downs had to timely file an application including a "binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinafter." Nonetheless, the faxed application included a document titled "Conditional Commitment for Collaterlized Mortgage Financing" by Remington Financial Group, Inc. This document expressly provided that the loan commitment was not valid unless a copy of the commitment was dated, signed by the borrower and lender and returned on or before November 10, 1998. The application and documents received by the Racing Commission never included a signature page for the conditional commitment. In fact, it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page.

We note that the conditional commitment submitted by Livingston Downs provided for financing in the "maximum amount of ($10,000,000.00)" rather than in "an amount not less than" ten million dollars as required by

the consent judgment. Also, the conditional commitment provided for ownership in the "project" by unknown persons at the sole and absolute discretion of Remington Financial Group, Inc." This provision conflicts with La. R.S. 4:147(4), which requires a corporate applicant seeking a license to operate race meets to fully disclose the names of the stockholders and directors of the corporation.

After reviewing the record in this case, we cannot say the trial judge's finding that Livingston Downs' application including the Conditional Commitment for Collaterlized Mortgage Financing did not satisfy the terms of the November 15, 1996 consent judgment was clearly wrong.

Accordingly, the judgment of the trial court rendered on December 4, 1998, granting the Racing Commission's motion to dismiss Livingston Downs' suit against it is affirmed. Our decision herein does not preclude Livingston Downs from reapplying for a license to operate race meets in the future.

AFFIRMED

EXHIBIT

Appendix 3

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, March 16 2000

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

JEFFERSON DOWNS CORP., ET AL V LOUISIANA STATE RACING COMM. no. 99-CA-1001 C/W 99-CA-1002

Very Truly yours,
DANIELLE A. SCHOTT
CLERK OF COURT

/s/ Calendered VE

EXHIBIT

Appendix 4

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NOS. 92-20961 c/w
95-15331

DIVISION "G" DOCKET:
SECTION "11"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

JUDGEMENT

The above captioned proceeding came for hearing on the merits of defendant, LOUISIANA STATE RACING COMMISSION, Motion To Dismiss on Friday, December 4, 1998:

PRESENT: KIM RAINES CHATELAIN,
Attorney for defendant,
Louisiana State
Racing Commission
VICTOR A. SACHSE, III
Attorney for plaintiff,
Livingston Downs
Racing Association, Inc.

DARLENE S. RANSOME
Attorney for plaintiff,
Livingston Downs
Racing Association, Inc.

After considering the law, the evidence, and for the reasons orally assigned

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana State Racing Commission, dismissing the above captioned suit by plaintiff, Livingston Downs Racing Association, Inc. against defendant, Louisiana State Racing Commission, with prejudice at plaintiff's cost pursuant to the Consent Judgment entered November 15, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 4 day of December, 1998.

/s/ (Sgd.) Robin M. Giarrusso
JUDGE
[SEAL]

APPENDIX F

[Exhibits Omitted In Printing Except Exhibit 4]

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

NO. 2000-C-1067

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

VERSUS

STATE OF LOUISIANA, ET AL

ON WRIT APPLICATION BY LIVINGSTON DOWNS RACING ASSOCIATION, INC. FROM FOURTH CIRCUIT COURT OF APPEAL, NO. 99-CA-1001 CONSOLIDATED WITH NO. 99-CA-1002

AFFIRMING JUDGMENT

RENDERED BY JUDGE ROBIN A. GIARRUSSO, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 95-15331 CONSOLIDATED WITH NO. 92-20961 CONSOLIDATED WITH 97-12435

OPPOSITION TO WRIT APPLICATION

(Filed May 1, 2000)

RICHARD P. IEYOUB
Attorney General

By:
KIM RAINES CHATELAIN
LSBA #21525
Assistant Attorney General

320 N. Carrollton Avenue,
Suite 2-Bt
New Orleans, Louisiana 70119
Telephone (504) 483-4000
Telefax (504) 483-4898
Attorney for State of Louisiana,
Racing Commission

MAY IT PLEASE THE COURT:

Respondent, State of Louisiana through the Louisiana State Racing Commission, submits the following opposition to relator, Livingston Downs Racing Association, Inc, application to this court to exercise its supervisory jurisdiction.

Livingston Downs has made an enterprise over the past five years of suing the Racing Commission, and from time to time, its individual commissioners.

The Supreme Court may recall that the parties were last before it regarding the constitutionality of La.Rev.Stat. 4:211 and off-track wagering rights in the matter **Livingston Downs Racing Ass'n, Inc v. State of Louisiana, et al.** No. 96-CA-2890, 705 So.2d 149 (La. 1997) The Court upheld the statute which precluded Livingston Downs from obtaining an off-track wagering license. Nevertheless, Livingston Downs persisted in suing the Racing Commission for off-track wagering rights.[1]

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[1] **Livingston Downs Racing Ass'n v. La. State Racing Comm'n.** No. 97-12435, Div "K" c/w No. 95-15331 "J" c/w No. 92-20961 "G", Civil District Court, Orleans Parish, Louisiana; 4th Circuit Court of Appeal No. 98-CA-1229 (affirming trial court judgment to dismiss suit).

With each suit, appeal, and writ application Livingston Downs reiterates and regurgitates *ad nauseam* the same misstatement or half-statement of facts, relevancy notwithstanding. The present writ application is without distinction. Essentially, Livingston Downs presents again the same argument presented to the Fourth Circuit Court of Appeal which was the same argument presented to the trial court. The only distinction to be drawn is the degree of factual embellishment and sweeping criticisms:

> the Court of Appeal's decision has so far departed from proper judicial proceedings or so abused its powers, and sanctioned such a departure or abuse by the trial court that this Court's exercise of its supervisory jurisdiction is warranted.

Livingston Downs' grievance is not that the court of Appeal or the trial court departed from proper judicial proceedings, but that the courts did not depart far enough to find merit in Livingston Downs' arguments that a "Consent Judgment" is not a judgment, and a hearing following notice and service is not a contradictory hearing.

The instant matter comes before the Court following a decision of the Fourth Circuit Court of Appeal AFFIRMING a judgment of the district court granting a motion to dismiss filed by the Racing Commission. The judgment of the trial court was entered after contradictory hearing dismissing with prejudice the matter **Livingston Downs Racing Ass'n, Inc v. La. State Racing Comm'n,** No. 95-15331, Division "J" transferred to "G" c/w Jefferson Downs, Inc et al. v. La. State Racing Comm'n, No. 92-20961 Div. "G" and c/w Livingston Downs Racing

Ass'n v. La. State Racing Comm'n, No. 97-12435, Div. "K" transferred to Div "G".

The issue before the trial court and appealed was whether Livingston Downs submitted to the Racing Commission an application for racing license with a "binding enforceable commitment in an amount not less than TEN MILLION ($10,000.00 [sic]) DOLLARS" per the terms of a consent judgment entered into between the parties on November 15, 1996.

The trial court held, and the court of appeal affirmed, that a "Conditional Commitment For Collateralized Mortgage Financing" purportedly proving financing in a "maximum amount of Ten Million ($10,000,000) Dollars" did not constitute the binding, enforceable commitment in an amount not less than Ten Million ($10,000,000) Dollars required by the consent judgment.

Among its thirteen different assignments of error, Livingston Downs does not challenge this *holding*.

Unless this court reaches an opposite legal determination, relator, Livingston Downs, writ application must be denied.

Because the arguments on application to the Supreme Court vary little from those presented to the appeal court, the Racing Commission attaches hereto and wishes to incorporate herein its Original Brief to the Fourth Circuit. To the extent Livingston Downs extends is [sic] argument beyond that presented on appeal, the Racing Commission submits the following considerations.

ARGUMENT

Livingston Downs assignments of error do not focus on the substantive determination of law, i.e. that the conditional commitment submitted was not the binding enforceable commitment required by the consent judgment, but more the procedures and proceedings, which brought the issue on appeal. It cannot be that both the trial court and the court of appeal erroneously ruled upon the substantive issue without due regard for proper judicial procedure.

Livingston Downs notion of proper judicial procedure would have this litigation extend in perpetuity without ever reaching a final resolution; swirling in an unending cycle of administrative adjudications, appeals and back again.

The Racing Commission entered into the consent judgment with Livingston Downs four years ago to put an end to the dispute.

Livingston Downs now presents that the consent judgment did not put to rest the dispute between the parties, but cleared the way for a whole new process of administrative adjudications, and thereafter, appeals.

These arguments are without merit. The trial court and the court of appeal correctly interpreted and enforced the clear and unambiguous provisions of the consent judgment.

1. Appeal Court Properly *Held* Livingston Downs Failed To Satisfy Terms of Consent Judgment: the "Conditional Commitment"

Livingston Downs was granted an association license in May 1993 to conduct live horse racing. Later in August, it was awarded racing dates to conduct a race meet. After time and when no race track was forthcoming nor any evidence of a race track, the Racing Commission decided to withdraw, revoke and terminate the licenses for failure to fulfill the purpose for which they were granted.

A Petition for Trial De Novo and Suspensive Appeal was filed by Livingston Downs in the 21st Judicial District Court, Livingston Parish, Louisiana appealing the Commission's decision. The matter was transferred to Civil District court and consolidated with a related matter.

The revocation of the license was suspended pending a trial on the merits when the suit was resolved via consent judgment. A copy of the judgment is attached hereto as Exhibit 2. The consent judgment afforded Livingston Downs two (2) additional years to rehabilitate and make itself financially able to fulfill its obligations under the licenses issued to it. Under its terms, Livingston Downs was to re-apply to the Commission for a license to operate a race track on or before October 31, 1998 which application shall include a

> binding enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000) DOLLARS, which provides for the funding of the construction of a racing facility, including a grandstand, racing oval and backside.

Exh. 2, paragraph 6.

On October 30, 1998, Livingston Downs sent via fax an application attached to which was a document entitled *"Conditional* Commitment For Collateralized Mortgage Financing". The document purportedly provided for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but was subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which was based on the "sole and absolute discretion" of the author of the commitment. A copy of the Conditional Commitment is attached hereto as Exh. 3.

Under La.C.C.art. 1770, an obligation dependent upon a suspensive condition the satisfaction of which depends solely on the will of one obligor renders the obligation null. An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Ass'n, Inc v. HNC Realty Co et al.** 531 F.2d 1249 (5th Cir. 1976).

On appeal, the court affirmed the trial court's determination that the "Conditional Commitment" submitted by Livingston Downs did not satisfy the terms of the November 15, 1996 consent judgment.

Livingston Downs has not assigned as an error this finding. Rather, it accuses the court of "basing its decision on semantics."[2]

Semantics is the study and classification of words or forms viewed as factors in linguistics developments.

---

[2] Livingston Downs, Writ Application, at p. 11.

The court's decision was not based on semantics. The matter is not one of semantics, but one of definition. More importantly, it is a matter of legal distinction. A conditional commitment for a maximum amount of Ten Million Dollars is not a binding enforceable commitment for an amount not less than Ten Million Dollars.

2. Appeal Court Properly Interpreted The Consent Judgment In Order to Reach Its Decision

Though Livingston Downs does not assign as error the court's legal finding that the conditional commitment was not an enforceable commitment required by the consent judgment, it does assign various other errors to the appeal court's interpretation and enforcement of the consent judgment generally. These errors are without merit. The Fourth Circuit as well as the trial court properly interpreted and enforced the express and unambiguous provisions of the consent judgment.

a. Consent Judgment Finally Resolved Initial Dispute Of Revocation

Livingston Downs assigns as an error that the appellate court improperly concluded that the consent judgment rendered moot the issue of whether the Commission properly revoked Livingston Downs' license.

Of course, the appellate court concluded that entering into the consent judgment finally resolved the issues raised by the initial petition. What would the purpose of

the consent judgment be otherwise if not to finally resolve the dispute? If the purpose was to do nothing more than to afford Livingston Downs two additional years there would have been no need for a *Judgment* or for that matter a revocation.

Livingston Downs license was revoked by the Racing commission in an open meeting in August 1994.

Subsequently, Livingston Downs sued the Racing Commission appealing the decision to revoke the license. The suit raised substantive and procedural issues with the revocation, including an allegation that the revocation violated the requirements of the Administrative Procedure Act. These allegations were denied by the Racing Commission.

The matter was postured for trial when the parties jointly agreed to resolve the dispute, as well as settle other disputes, and entered into the consent judgment.

It is clear from the consent judgment that its purpose was to forever put to rest the issues raised by the original petition by mandating that on or before October 31, 1998 a new "application filed by Livingston Downs Racing Association, Inc for a ten (10) year license" would be considered by the Commission.

b. Pertinent Provisions Of The Consent Judgment Were Properly Applied

Livingston Downs further assigns as an error that the appeal court failed to recognize pertinent provisions of the consent judgment.

It is not the courts who ignore pertinent provision of the consent judgment, but Livingston Downs who chooses to select provisions from the judgment and present out of context.

The consent judgment never contemplated that the dispute would return to resolve at the administrative level but specifically provided that district court would retain jurisdiction:

> 18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

The court of appeal correctly reasoned the following:

> By its terms, the consent judgment anticipated three possible conclusions to the litigation: 1) Livingston Downs timely filed an application including the binding, enforceable commitment letter and the Racing Commission approved the application; 2) Livingston Downs failed to file a timely application including a binding, enforceable commitment letter; and 3) Livingston Downs timely filed an application with the binding, enforceable commitment letter but the Racing Commission failed to approve or act upon it. In any of these events, the consent judgment clearly provided for a remedy in district court.

The remedy available to the Commission was provided at paragraph 15 of the consent judgment:

> . . . in the even [sic] that Livingston Downs Racing Association, Inc fails to file an application with a binding, enforceable commitment

> letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including grandstand, racing oval and backside, then these proceedings **shall be dismissed** with prejudice at plaintiff's costs.

The remedy provided to Livingston Downs is found at Paragraph 16 which states:

> . . . in the event an application [per Paragraph 6 with a binding, enforceable commitment letter] is timely filed, but the Commission withholds its approval or acceptance of the funding sources or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc may after October 31, 1998 obtain judicial review of such action by summary proceeding or in a trial de novo or otherwise apply to this Court for appropriate relief.

On appeal, the court correctly recognized that whether the trial court reviewed the application filed by Livingston Downs on motion of the Racing Commission or on petition by Livingston Downs the determination rested with the district court.

Neither the trial court nor the court of appeal could find logic or merit in Livingston Downs contention that the district court could not hear the motion to dismiss filed by the Racing Commission until the Racing Commission considered the application in accordance with the Administrative Procedure Act. The Racing Commission already adjudicated Livingston Downs license which is what inspired the law suit. The Racing Commission

approved the consent judgment resolving the suit in an open meeting all in accordance with the Administrative Procedure Act. The Racing Commission was not required to adjudicate its own adjudication until it reached a decision satisfactory to Livingston Downs. The review of its actions are reserved to the courts.

The issue raised to the trial court by the motion to dismiss was a legal issue, e.g. whether the application and conditional commitment submitted by Livingston Downs complied with the terms of the consent judgment.

If the trial court could not as a matter of law find that Livingston Downs timely submitted an application which included a binding, enforceable commitment letter in an amount not less then Ten Million ($10,000,000) Dollars, then neither could the Racing Commission.

The trial court determined as a matter of law, and the appeal court correctly affirmed, that Livingston Downs did not timely submitted [sic] an application which included a binding, enforceable commitment letter in an amount no less than Ten Million ($10,000,000) Dollars as required by the consent judgment.

A conclusion anticipated and provided for in the consent judgment which required that the case be dismissed.

c. Court Of Appeal Did Not "Rely" On Settlement Agreement

Livingston Downs further assigns as an error that the court of appeal improperly relied upon the settlement agreement which was not properly before the court.

The court of appeal did not rely upon the settlement agreement. Its holding clearly turns on the interpretation and enforcement of the consent judgment.

Livingston Downs graciously acknowledges in its application to the Court that the "intent of the parties regarding the instant litigation is set forth in the consent judgment."

Nonetheless on appeal, it gratuitously referenced matters which were outside the scope of the consent judgment and/or were the subject of the larger settlement. Livingston Downs repeats these references in the instant writ application.

For example, it presents to the Court the excuse that a suit "Terrance Lee Odom v. Livingston Parish Police Jury" on of [sic] the docket of the 21st Judicial District Court, Livingston Parish presented a "serious impediment" to obtaining its financing. The terms of the consent judgment were not contingent upon the resolution of any other pending litigation.

Likewise, Livingston Downs repeatedly remarks upon its suit against individual members of the Racing Commission filed in United States Court, Middle District of Louisiana. This suit was the part of the larger settlement reached between the Racing Commission and Livingston Downs of which the consent judgment represented only a part.

These references made by Livingston Downs both on appeal and on application to the Court are wholly **de hors** the record. If it was Livingston Downs intention on appeal that the court of appeal only and properly restrict

its considerations to the consent judgment, then it should not have referenced matters, suits and settlements which are outside the four corners of the judgment.

2. Trial Court Granted Racing Commission Motion To Dismiss Following Contradictory Hearing

Livingston Downs also assigns as error that the appellate court erred in affirming the decision of the trial court alleging that the trial court did not properly conduct a contradictory hearing. It further contends that the hearing constituted an unlawful adjudication of its license.

The court properly conducted a contradictory hearing on the Racing Commission motion to dismiss.

The Racing Commission filed its motion to dismiss and order to show cause on or about November 10, 1998. The motion was set for hearing on December 4, 1998, and Livingston Downs was served through its counsel of record.

The single issue before the trial court was whether Livingston Downs timely filed an application in accordance with the terms of the consent judgment.

The morning of the hearing Livingston Downs filed a Motion to Enforce Paragraph 16 of the Consent Judgment, exceptions and a writ of mandamus.

The basis of Livingston Downs complaint is not that the motion to dismiss came for hearing without notice or service, but that it was not allowed to respond to the motion to dismiss by arguing the merits of motions and

exceptions which were not properly before the court. This complaint is without merit.

Further, the Court will recall that paragraph 16 of the consent judgment provided that in the event the Racing Commission failed and/or refused to act upon the application submitted by Livingston Downs, then Livingston Downs remedy was to obtain judicial review in district court.

Whether the motion to dismiss was a lawful exercise by the Racing Commission of its remedy under the consent judgment or an act of failure to act upon the application, Livingston Downs remedy enforceable under paragraph 16 was a review by the court.

The trial court reviewed the application. Livingston Downs did not and could not present any evidence that the "Conditional Commitment" included in its application to the Racing Commission satisfied the terms of the consent judgment.

Instead, Livingston downs argued to the trial court and assigns as a [sic] error to the appeal court that the Racing Commission had a [sic] independent obligation to "investigate" the conditional commitment. The consent judgment required Livingston Downs file an application with a binding enforceable, commitment in an amount no less than Ten Million ($10,000,000) Dollars. All other obligations flowing from the judgment were predicated upon the timely receipt of a valid application. Both the trial court and the court of appeal correctly rejected, with good reason, the inane proposition that the Racing Commission was obliged under the consent judgment to

investigate a commitment that was unenforceable for an amount less than Ten Million ($10,000,000) Dollars.

3. Appeal Court Correctly Ruled Upon The Issue Before It With Benefit of All Relevant Documents

Finally, Livingston Downs assigns among its errors that the court [sic] appeal court erred in affirming the trial court's decision because the record was grossly incomplete and/or inaccurate.

First, the Court of Appeal correctly found that the issues raised by the original suit were laid to rest by the Consent Judgment.

Thus, the only relevant issue on appeal was a de novo review of the consent judgment and the application filed by Livingston Downs with attachments. These documents were properly before the court.

Livingston Downs presents that it filed three separate motions to order the Clerk of Court to complete the record on appeal contending that the record was never completed.

Livingston Downs does not tell the Court that the entirely of the record might have been returned to the Court of Appeal from the Civil District Court but for Livingston filing a Motion to Limit the Record on Appeal.

Considering the number of consolidated matters and piecemeal appeals, it is virtually imprudent of Livingston Downs not to confirm that the record returned is the record on appeal. But, Livingston Downs did not consider

the record on appeal sufficiently important to confirm the return of record before filing its brief.

Rather, it was counsel for the Racing Commission who brought to the attention of the Clerk of Civil District Court, Clerk of the Fourth Circuit Court of Appeal and counsel for Livingston Downs that the record returned to the court of appeal was not complete. **See** Letter attached as Exh. 4. Having reviewed the record at the trial court, it was apparent that the record was there but parts were inadvertently left out when returned to the appeal court.

Rather than working directly to resolve the issue, Livingston Downs seized upon it as an opportunity to delay the appeal proceedings filing multiple extensions of time to file a reply brief and seeking to postpone oral argument.

Now, it endeavors to exploit its own imprudence as a means to set aside the decision on appeal.

At the time the matter was submitted for decision to the Fourth Circuit Court of Appeal, it had before it all relevant documents to the issues on appeal.

CONCLUSION

For the foregoing reasons, the Racing Commission respectfully opposes Livingston Downs writ application to the Supreme Court requesting it exercise is [sic] supervisory jurisdiction.

Respectfully submitted:

RICHRD [sic] P. IEYOUB
Attorney General

By: /s/ Kim Raines Chatelain
Kim Raines Chatelain,
LSBA #21525
Assistant Attorney General
320 N. Carrollton Avenue, Suite 2-Bt
New Orleans, Louisiana 70119
Telephone (504) 483-4000
Telefax (504) 483-4898
Attorney for State of Louisiana, Racing Commission

Exhibit 4

[Names And Addresses Omitted In Printing]

(LOGO)

Louisiana State Racing Commission

August 9, 1999

Hon. Danielle A. Schott
Fourth Circuit Court of Appeal
1515 Poydras Street, 7th Floor
New Orleans, Louisiana 70112

Hon. Dale Atkins
Clerk of Civil District Court
421 Loyola Avenue
New Orleans, Louisiana 70112

Ms. Darlene S. Ransome, Esq.
5353 Florida Blvd.
Baton Rouge, Louisiana 70806

VIA FAX AND POST
(225) 928-2938

RE Livingston Downs v. La. State Racing Commission **CDC, No. 95-15331, Div "J"**, c/w No. 92-20961, c/w No. 97-12435
4th CCA No. 99-CA-1001

Dear Hons. Schott and Atkins and Ms. Ransome:

The Racing Commission is appellee in the above referenced appeal.

In an abundance of caution and with all candor to the court and appellant, I writ [sic] to notify that the record returned to the court of appeal is not the record designated for return. Attached you will find a copy of pleadings returned. You will note that only the last three entries relate to case appealed. All other pleadings relate

to a matter on the docket of Civil District Court designated No. 92-20961.

Livingston Downs appeals a judgment dated December 11, 1999 on the docket of Civil District Court designated No. 95-15331. A motion and order was entered limiting the record on appeal to Civil District Court No. 95-15331 only.

Pleadings filed in No. 95-15331 which were not properly returned to the Court of Appeal include by way of example:

(1) Original Petition (filed in 21st JDC and transfered to CDC)
(2) Motion to Consolidate
(3) Answer
(4) Trial Order
(5) Consent Judgment

Exceptions, Motion for Writ, and others.

This matter as well as the consolidated matters Nos. 92-20961 and 97-12435 have previously been before the court [sic] appeal on various appeals and writs. Thus, these pleadings would ordinarily be available to the court of appeal for review in the present matter. However, I am informed that the Fourth Circuit has only the present appeal record in its court. Originals from prior appeals have been returned to Civil District Court.

Civil District Court maintains the record reflected by the attached document in an "appeal" file (red). It also maintains two other "appeal" files (blue). It appears from a review of all three files that pleadings filed into CDC

No. 95-15331 are contained in all three "appeal" files mixed with pleadings filed in CDC No. 97-12435.

Appeals clerk at Civil District Court, Celeste, advises that the record returned to the Court of Appeal was the record designated. However, she also states that all pleadings in consolidated matters are filed into the lowest number.

The record returned was not the record designated because the record designated was all pleadings relating to No. 95-15331. Those pleadings were not returned.

I am informed that Civil District Court will compile the contents of the two other "appeal" files (blue) and return them to the Court of Appeal as an "exhibit."

This is an appeal from a final judgment dismissing case No. 95-15331, Civil District Court. The matter cannot properly be adjudicated without the entire record properly before the court.

Sincerely,

/s/ Kim Raines Chatelain
KIM RAINES CHATELAIN

enclosure

cc: Mr. Albert Stall, Chairman
Legal Committee

KRC/mmi

APPENDIX G

[Exhibits Omitted In Printing]

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NOS.92-20961 c/w
95-15331

DIVISION "G" DOCKET:

SECTION "11"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The defendant, **LOUISIANA STATE RACING COMMISSION,** has filed a Motion to Dismiss the above captioned and numbered proceeding pursuant to the order of this court set forth in a Consent Judgment signed by all parties on November 15, 1996. This memorandum is submitted in support of the Motion to Dismiss.

The captioned matter has its genesis in a decision made by the Louisiana State Racing Commission ("Racing Commission") on August 29, 1994 to withdraw, revoke and terminate a ten (10) year license issued on May 27, 1993 to Livingston Downs Racing Association, Inc. ("Livingston Downs") and a license and/or permit issued on August 26, 1993 to conduct a live race meet.

The Commission's decision was appealed to this court by instituting the captioned suit wherein Livingston Downs alleged among other grievances that the Racing Commission withdrew, revoked and terminated Livingston Downs licenses and/or permits without just cause. The Racing Commission answered the suit by averring that it had just cause for its actions because of Livingston Downs' (1) continued failure or inability to meet its financial obligations connected with fulfillment of the purposes for which its license(s) were issued, including but not limited to the failure and inability to expend the sum of not less than $10,000 each year for foreseeable future improvements to the track and its facilities; (2) material false statement to the commission; (3) and intentional falsification and/or intentional misstatement of material fact in an application for racing privileges.

Only after extensive and exhaustive litigation and negotiation, the Racing Commission and Livingston Downs entered into a Consent Judgment in November 1996. The Consent Judgment provides that the licenses issued to Livingston Downs shall be suspended and the Racing Commission shall not except as provided in the Consent Judgment be required to consider Livingston Downs as a licensed racing association. The Consent Judgment further provided the following:

1. that the Racing Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish;

2. that any application for permits or license to be issued to Livingston Downs Racing Association, Inc., shall conform to the provisions of La.R.S. 4:158 and 4:147(4)(a) through (g) and 147(5)

3. that any application for permits or license to be issued to Livingston Downs Racing Association shall include within the application **"binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside;

4. the commitment must issue from source suitable to and acceptable to the Commission, after prompt investigation.

On October 30, 1997 the Racing Commission received via fax the following documents:

1. an application by Livingston Downs Racing Association, *L.L.C.* (not Livingston Downs Racing Association, Inc.) for racing license;

2. Financial Statement of Livingston Downs Racing Association, *L.L.C.*;

3. Balance Sheet of Livingston Downs Racing Association," *Inc.*

4. Conditional Commitment for Collateralized Mortgage Financing, by Remington Financial Group, Inc. to applicant Mr. Al J. Ransome, Livingston Downs Racing Association, *Inc.*. **See** Exhibit 1, **in globo.**

The Conditional Commitment for Collaterlized Mortgage provides that the Commitment is not valid unless a

copy of such Commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998. The documents received by fax on October 30, 1998 did not have attached thereto any signature page for the Conditional Commitment. An original application and a copy of the Commitment with the signature page was later received via federal express on Monday, November 1, 1998. The Commission is not in possession of any document which would confirm or refute whether the Commitment was timely returned with signatures to the named lender.

Livingston Downs Racing Association, Inc. has failed to satisfy the terms and conditions of the Consent Judgment in the following particulars:

1. The Conditional Commitment for Collateralized Mortgage Financing is not a binding and enforceable commitment in an amount not less than Ten Million ($10,000,000.00) Dollars;

2. The Conditional Commitment allows for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group, Inc. subordinating the Racing Commission regulatory authority under La.R.S. 4:147(4) to that of another.

3. The application for license was not made by Livingston Downs Racing Association, Inc. now known as ALDAR, Inc. but by Livingston Downs Racing Association, L.L.C. a separate and distinct legal entity from the party to this suit.

1. Failure To Obtain Binding, Enforceable Loan Commitment

The document entitled **"Conditional Commitment For Collateralized Mortgage Financing"** made a part of the application by Livingston Downs, L.L.C. purportedly provides for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but is subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which is based on the **"sole and absolute discretion of Remington Financial Group, Inc."**. These terms and conditions include by way of example:

1. "[t]he loan amount ("Loan") will be in the principle amount of $10,000,000. Said loan amount shall not exceed 80% of subject property's Fair Market Value.

2. "[t]his Loan commitment is contingent on Borrower having the capability, **in its sole discretion** of Lender, of servicing and repaying of Loan in accordance with its terms";

3. "[a]t and in all events, this Loan commitment is subject to Lender's approval **in its sole discretion** of all necessary documentation relating to Borrower, Project and Collateral;

First, the Conditional Commitment is not enforceable as it is replete with suspensive conditions the satisfaction of which is wholly contingent on the sole discretion of lender, Remington Financial. La.C.C. art. 1770 provides that a suspensive condition that depends solely on the will of the obligor makes the obligation null.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Association, Inc., et al v. HNC Realty Company et al,** 531 F.2d 1249 (5th Cir. 1976). The **Willowood** court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. In that case, there was no delineation of essential elements of a loan including failure to set forth with specificity how and when interest on the loan would be adjusted or paid, how and when disbursements would take place or a mortgage. Further, the purported commitment letters implied there would be further negotiations which would take place. Here, the court held that a letter setting forth terms upon which a loan to developers would be made subject to approval of a loan committee which failed to include essential terms of a loan was not an enforceable loan commitment. (**Willowood,** at 1252) (citing **Wheeler v. White** 385 S.W.2d 619 (1964), rev'd on other grounds, 398 S.W.2d 93 (1965) holding that a loan commitment which provided the principal amount of loan, interest, and term but failed to provide amount of monthly payments was unenforceable.)

The Conditional Commitment provided by Livingston Downs is likewise nothing more than a letter setting forth terms upon which a loan may be made but is not in and of itself an enforceable loan commitment. There is no funding date specified; while the term of the note may be set at 60 months, there is no monthly payment set forth; rate of interest is not set forth with specificity; there is no commitment fee paid which is evidenced by the writing; and it implies the need for

substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors the author of the commitment may find.

Next, the Consent Judgment required a binding, enforceable loan commitment of not less than Ten Million ($10,000,000) Dollars. The "loan commitment" provided is not for an amount not less than Ten Million ($10,000,000) Dollars but for an amount not to exceed Ten Million Dollars providing the fair market value of the project is worth at least Twelve Million Five Hundred Thousand ($12,500,000) or 80%.

2. Ownership Participation By Unknown Persons

Secondly, the Conditional Commitment allows for ownership in the "project" by unknown persons at the sole discretion of Remington Financial Group, Inc.:

1. "15% net cash flow, profit participation and ownership of the project shall go to RFG, which interest shall begin upon principal and interest repayment, provided said participation generates a 25% minimum annual I.R.R."

2. "Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at any time thereafter."

3. " . . . Borrower shall also pledge 100% of available stock of Borrowing entity until all principal and interest is repaid."

Paragraphs 7, 8 & 11, Conditional Commitment.

La.R.S. 4:147 (4) requires each applicant seeking license as a racing association to set forth the names of the stockholders and directors of the corporation.

The Conditional Commitment implies that RFG and/or subsequent unknown investors will have an ownership interest in the "project" as a condition of financing. When, where, how and in what form this interest may manifest itself is unknown and undisclosed to the Racing Commission at this time. However, in any event such a condition inevitably subordinates the Racing Commission's regulatory authority under La.R.S. 4:147 to that of the financier of the "project".

3. Application By Livingston Downs Racing Association, L.L.C.

The terms of the Consent Judgment provided that the Racing Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish.

Livingston Downs Racing Association, Inc. did not make application to the Racing Commission for a ten year license. Rather, Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity not previously licensed by the Racing Commission, made application to the Commission. **See,** Exh. 1 **in globo.**

Livingston Downs Racing Association, Inc. is a Louisiana corporation formed in October 1992 by Al Ransome who is registered agent and president. There were no other officers or directors. The licenses and permits at

issue in this litigation were granted to Livingston Downs Racing Association, Inc.

In October 1998, Livingston Downs Racing Association, Inc. changed its name to ALDAR Investments, Inc. **See** Exh. 2, **in globo.**

At or about the same time, Darlene S. Ransome now acting as agent for ALDAR, Inc. formerly known as Livingston Downs Racing Association, Inc. formed Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity. The limited liability company articles of incorporation are signed by Darlene Ransome and Al Ransome for Livingston Downs Racing Association, L.L.C. **See** Exh. 2, **in globo.**

Livingston Downs Racing Association, L.L.C., not plaintiff herein, makes application to the Racing Commission for license. However, the limited liability company attaches to its application Livingston Downs Racing Association, Inc. income statement and balance sheet. According to its balance sheet, Livingston Downs Racing Association, Inc. holds approximately $1 million in assets but $2 million in liabilities. **See** Exh. 1, **in globo.**

Livingston Downs Racing Association, L.L.C. has a zero net worth.

Livingston Downs represents to the Commission that these alterations were necessary because potential lenders expressed their desire to do business with a limited liability company rather than a corporation. **See** Letter of Darlene Ransome, Exh. 2.

However, the Conditional Commitment is made to applicant, Al J. Ransome and Livingston Downs Racing Association, Inc.

It is not certain or clear the need for participation and alteration of corporate forms or the addition or subtraction of officers, directors or managers.

It is clear that Livingston Downs Racing Association, Inc. has not complied with the terms of the Consent Judgment and has in fact submitted no application.

CONCLUSION

It has been five years since Livingston Downs Racing Association, Inc. has first received a license to conduct live racing. Livingston Downs has had two years since the Consent Judgment suspending and/or ending litigation between itself and the Racing Commission. Still, there is no race track and no evidence of improved financial ability to construct one. The Conditional Commitment is a conditional commitment and not an enforceable, binding loan commitment for an amount not less than ten million dollars. Livingston Downs has failed to satisfy the terms and conditions of the Consent

Judgment, and pursuant to the judgment this matter should be dismissed with prejudice at plaintiff's costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon Counsel for all parties by telefacsimile transmission and/or by mailing the same to each properly addressed and postage prepaid on 11-10-98, 1998.

/s/ Kim Raines Chatelain

APPENDIX H

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 92-20961 **DIVISION "G"**

JEFFERSON DOWNS, INC., ET AL.

VERSUS

LOUISIANA STATE RACING COMMISSION

consolidated with

NO: 95-15331 **DIVISION "J"** **SECTION 13**
transferred to "G"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

VERSUS

LOUISIANA STATE RACING COMMISSION

OPPOSITION TO MOTION TO DISMISS

MAY IT PLEASE THE COURT:

I. Background

NOW INTO COURT, through undersigned counsel, comes Livingston Downs Racing Association, Inc. ("LDRA"), plaintiff in the above entitled and numbered cause, appearing herein in opposition to the Motion to Dismiss filed by defendant, Louisiana State Racing Commission ("Commission"), respectfully represents that on November 15, 1996 the parties and this court entered into a consent judgment which provides in pertinent [sic]:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and

4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application

for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent decree (a copy of which is attached as Exhibit "A") was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, State of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed. The consent judgment was entered into in order to attempt to resolve the issue of LDRA's license revocation by the Commission.

If the parties had not entered into a consent judgment then the case would have proceeded to trial in Judge Giarrusso's court on the merits.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish. This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of horse racing in Livingston Parish. A copy of the dismissal order signed by the First Circuit Court of Appeal is attached hereto as Exhibit "B".

As soon as the dismissal was ordered, LDRA sent a written request to Commission for an extension of the October 31, 1998 deadline contained in the Consent Decree. (Exhibit "C").

On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. (Exhibit "D"). A meeting notice was forwarded to Mr. Bursavich. (Exhibit "E").

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. This is in violation of the Administrative Procedure Act.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on the LDRA request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. (Exhibit "F"). LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. (Exhibits "G" and "H," respectively) On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. (Exhibit "I"). LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, the Commission arbitrarily and capriciously rejected said commitment without even communicating with the lender or

LDRA. The action of the Commission is in direct violation of the Administrative Procedure Act, is in bad faith and violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

Then, on November 10, 1998 the Commission filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter timely. However, the Commission has not even acknowledged receipt of said commitment or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." (Exhibit "J"). This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before this Court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said

clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarrusso's office and was advised by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and allow it oral argument.

II. Law and Argument

A. The motion to dismiss is not properly before the Court.

The settlement agreement, which is the subject of the motion to dismiss is a contract between the plaintiff and the defendant in the form of a consent judgment, which was approved by the Commission in open meeting in compliance with the statutes.

The Commission's actions are governed by the Administrative Procedures Act and by LSA-R.S. 42:6, the open meetings law. There exists no authority for the Commission's attorney or the Commission's chairman to unilaterally take action on behalf of the Commission without first having the matter heard by the full Commission and a vote taken on the subject matter. There is no record of this matter being heard in open meeting, therefore, there is no legally authorized motion before this Court.

B. The allegations of fact to support the motion to dismiss were determined by parties not authorized to act and were developed in violation of the Administrative Procedure Act.

The underlying purpose of the Commission's actions are to finally revoke all licenses issued by the Commission to the plaintiff. Clearly, the allegation of defendant's motion constitutes a finding of fact and the motion to dismiss is clearly an adjudication.

The procedures to be followed in an adjudication are outlined in LSA-R.S. 49:955. In *Tafaro's Inv. Co., Inc. v. Division of Housing, Inc.*, 261 La. 183, 259 So.2d 57 (1972) the court wrote:

> Where administrative agency adjudicates private property rights and obligations, parties must be afforded an opportunity to be heard, and, if private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative actions.

Here, the Commission made absolutely no attempt to comply with the law and there is no compelling public interest to rush to judgment.

C. The Commission failed to follow LSA-R.S. 49:961 in dealing with the matter of the revocation of a license.

In addition to the statutory requirements of LSA-R.S. 49:955, in the matter of a license application, LSA-R.S. 49:961 imposes special conditions. More specifically, R.S. 49:961(C) reads in pertinent part:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, *prior* to the institution of agency proceedings, the agency gives notice to the licensee of facts or conduct which warrants the intended action, *and the licensee is given the opportunity to show compliance with all lawful requirement for the retention of the license.* (Emphasis ours.)

In *La. State Board of Medical Examiners v. Bertucci*, 598 So.2d 798 (La. App. 4th Cir. 1992), the court wrote:

> Though under Administrative Procedure Act, notice and opportunity to be heard are required in any adjudication proceeding, *additional step* is required with respect to suspension, revocation, annulment or withdrawal of an existing license, whereby agency must give licensee an opportunity, *prior* to institution of formal proceedings, to show that the actions complained of do not violate the law or agency rules.

Here, LDRA in a good faith effort to comply with the consent decree, filed an application to reinstate its license and provided the Commission with a commitment for $10 million in financing. Without contacting or advising LDRA, or its lender, unknown persons acting without authority, flatly rejected LDRA's application and arbitrarily and capriciously declared that the commitment letter was not binding and enforceable. Subsequent to learning of the Commission's actions, LDRA's lender, RFG wrote to the Commission and offered to amend the commitment to meet the arbitrary objections to the commitment. (See Exhibit "J").

III. Conclusion

The Commission did not properly perform its duties according to statute and in good faith. This motion is improperly before the court and should be denied.

It is clear from the series of events and documentation provided that Section 16 of the consent judgment is applicable and that plaintiff LDRA, not defendant, is entitled to seek appropriate relief before this Court. The Commission, in bad faith, breached its agreement with LDRA and therefore, this case should be reinstated before this Court.

Respectfully submitted:

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on opposing counsel by facsimile and by placing same in the United States mail, postage prepaid and properly addressed this 1st day of December, 1998.

/s/ Darlene S. Ransome
Darlene S. Ransome

APPENDIX I

SETTLEMENT AGREEMENT

Livingston Downs Racing Association, Inc. (hereinafter "Livingston Downs") and Louisiana State Racing Commission hereinafter "the Commission") hereby agree to settle certain litigation affecting Livingston Downs, the Commission and in some instances present or past Commissioners on the following basis to-wit:

1. The parties agree to obtain a consent decree in the matter entitled "Livingston Downs Racing Association, Inc. versus Louisiana State Racing Commission," No. 92-20961 c/w 95-15331, Civil District Court for the Parish of Orleans in the form annexed as *Appendix A*.

2. Monetary matters between the Commission and Livingston Downs will be resolved as follows:

a. Livingston Downs v. State, No. 430,936, 19th Judicial District Court, shall be dismissed with prejudice.

b. Twelve Thousand Five Hundred and No/100 ($12,500.00) Dollars out of various deposits made by Livingston Downs with the Commission shall be returned.

c. Costs and attorneys' fees assessed against the Commission in various interlocutory orders and judgments in Livingston Downs Racing Association v. Edwin Edwards, et al., No. 399,563, 19th Judicial District Court, including the interlocutory appeal to the First Circuit, No. 94-CA-1514, shall be released. However, any costs and attorneys' fees assessed in the final judgment therein rendered on July 15, 1996 or as the same may be modified by the trial court or the court of appeal or other court are

not affected by this release. The forms of release are annexed as *Appendix B.*

d. The Commission's rule to show cause to Livingston Downs with respect to minimum license fees shall be dismissed on joint motion in the form annexed as *Appendix C.* The refund therein provided shall be part of the sum provided for in b above. Livingston Downs shall withdraw its application for 1996-97 race dates.

e. No other monetary matters remain open.

3. Livingston Downs Racing Association v. Jefferson Downs, et al., No. 96-3430-A-Ml, United States District Court, Middle District of Louisiana, shall be dismissed with prejudice insofar as against all present and past Commissioners, including but not limited to those named as follows Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas and as against Melinda Tucker.

4. Livingston Downs Racing Association v. Krantz, et al., No. 68,605, 21st Judicial District Court, Parish of Livingston, shall be dismissed with prejudice as to Oscar J. Tolmas.

5. Livingston Downs shall release all present and past Commissioners as provided in paragraph 3 hereinabove to all matters adverse to Livingston Downs through November 11, 1996, *Appendix D.*

6. The Commissioners' audit of Livingston Downs is deemed concluded and no further action will be taken with respect thereto.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement this 15th day of November, 1996.

LIVINGSTON DOWNS
RACING ASSOCIATION, INC.

/s/ Susan Plauche

BY: /s/ Al J. Ransome

/s/ Paul Bonin

LOUISIANA STATE RACING
COMMISSION

BY: /s/ Albert M. Stall

(3)

Supreme Court, U.S.
FILED
OCT 31 2000
CLERK

No. 00-297

In The

Supreme Court of the United States

LIVINGSTON DOWNS RACING ASSOCIATION, INC.
Petitioner,

v.

LOUISIANA STATE RACING COMMISSION
Respondent.

On Petition For Writ Of Certiorari To the Supreme Court Of The State Of Louisiana

PETITIONER'S REPLY BRIEF

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LAW AND ARGUMENT

The Louisiana State Racing Commission (hereinafter the "Commission"), through numerous misrepresentations of fact, contends that there are no grounds upon which Livingston Downs Racing Association, Inc. ("LDRA") can invoke jurisdiction under 28 U.S.C. §1257. LDRA clearly pled the federal questions of due process and equal protection beginning at the April 29, 1994 Commission meeting and in LDRA's appeals through the state district court, the state appellate court and the state supreme court. (See e.g. *Petitioner's Appendix M, pages 37m-41m, Petitioner's Appendix C, pages 10c-15c*). The Commission, however, contends that the mere fact that federal questions of due process and equal protection, clearly pled by LDRA, were not acted upon by the three state appellate courts precludes jurisdiction of this Honorable Court. To the contrary, this Honorable Court in West Virginia Board of Education v. Barnette, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) states:

> The Fourteenth Amendment as applied to States protects the citizen against the State itself, and all of its creatures--Boards of Education not excepted.

Consider the actors in this lengthy litigation. The powerful publicly-traded Fair Grounds Corporation used its influence to improperly enlist the aid of the Commission in protecting its monopoly. State Senator Larry Bankston, attorney for the Fair Grounds and chairman of the powerful "Judiciary B" legislative committee overseeing gambling matters in Louisiana, was convicted in Federal Court in 1997 of two counts of interstate communications in aid of racketeering involving the Louisiana video gaming industry. Former Governor Edwin Edwards, who appointed and controlled the members of the Commission, was recently convicted in Federal Court of 17 of 26 counts, including, but not limited to, violations of the Racketeer Influenced and Corrupt Organization ("RICO"), extortion and conspiracy,

involving the licensing of riverboat casinos. Edwards testified on behalf of the defense at Bankston's 1997 trial.

During Edwards' racketeering trial, testimony revealed that Bryan Krantz, President of the Fair Grounds, was a member of Edwards' "kitchen cabinet," a term referring to those insiders with considerable influence with the former Governor. More recently, a district court judge pled guilty to participating in a scheme with Edwards and others to "fix" an insurance settlement. While state offenses were involved, it was the United States Government rather than Louisiana's Attorney General, which indicted and convicted three consecutive insurance commissioners, a state senator and a former governor.

It is true that LDRA has been involved in significant litigation. It was necessary for LDRA to file suit to have its rights under the racing statutes defined. The Commission repeatedly refused to place LDRA on its meeting agendas for a ruling on LDRA's rights as to on-site other track simulcasting and off-track simulcasting. The license/permit granted to LDRA in December of 1992 was "only step one in a process which required [him] to apply for further licensing before he could operate a racetrack," Louisiana Fourth Circuit Court of Appeal in Docket No. 93-2235. The December, 1992 license/permit authorized a referendum election to be held which was required under state law to authorize horse racing in Livingston Parish. The granting of that license/permit was immediately attacked by the Fair Grounds in the state district court, which reversed the granting of the license/permit. That license was ultimately reinstated by the Louisiana Fourth Circuit Court of Appeal. The Commission's statement that it assisted LDRA in defense of its license in Suit No. 92-20961 (which the instant case was consolidated with on motion of the Fair Grounds' attorney) is ludicrous. The Commission took such a minute role in defending the grant of LDRA's license that had it not been for LDRA's intervention and defense in that suit, Judge Giarrusso's initial decision overturning LDRA's December

1992 license/permit would probably not have been overturned. In addition, LDRA had to defend the actual holding of the election. (LDRA's Petition, page 5). On January 16, 1993 the citizens of Livingston Parish approved the referendum. However, the results of the election were contested in state court and did not become final until the Fair Grounds' nominee agreed to dismiss the appeal on August 18, 1998, less than sixty days prior to the deadline imposed by the consent judgment for LDRA to obtain financing. LDRA has also had to fight and appeal the various attempts of the Commission to avoid completion of the licensing process and/or revoke its license.

In January of 1993 LDRA filed an application to the Commission for a ten year racing license and for approval of racing days. The Commission finally granted the ten year license and approved the racing days on May 27, 1993, only after LDRA filed a writ of mandamus. Eleven months later, on April 29, 1994 the Commission suspended and/or revoked LDRA's license despite the fact that the state courts had not ruled on the issues in litigation concerning the validity of the referendum. Between the legal attacks on LDRA's initial license/permit, the legal attacks on the results of the referendum and the Commission's suspension or revocation of LDRA's license, LDRA had no opportunity to begin construction of a race track. It is absurd for the Commission to imply that LDRA has dawdled around in regard to the building of the race track when LDRA's right to operate has been in limbo since the date it was awarded a license in 1992.

Due diligence on a loan application is a very expensive process. It is difficult to convince a lender or investor to undertake this process when the license required is in doubt. Throughout the period from 1992 to present, LDRA had only one brief period of less than sixty days in 1998 at which time its license was not under attack. During this time, LDRA obtained a commitment for financing, which the Commission's attorney arbitrarily rejected without authority and without the Commission holding a hearing to

address the issue. During this period, LDRA has expended over $1.5 million cash and incurred debt of an additional $1.6 million, all in connection with its options to purchase, renewals thereof and actual purchase of the land on March 29, 1996, pre-development costs and litigation. These amounts total over 30% of the $10 million in funds deemed acceptable by the Commission. For the Commission to allege that LDRA is not seriously pursuing the development of its racetrack is ridiculous.

The Commission, on page 6 of its opposition brief, states that it has a "continued commitment to licensing Livingston Downs when it was able to show the financial wherewithal to construct a racetrack and conduct a race meet." Yet, when LDRA did present its financial information on October 31, 1998 the Commission refused to hold a hearing on LDRA's "financial wherewithal" as required by statute and by the consent judgment. Instead the Commission's attorney unilaterally filed a motion in court to dismiss the pending lawsuit, thereby effectively revoking LDRA's license. Moreover, LDRA advised the Commission that it had a $10 million commitment to provide financing for the construction of the race track as far back as November, 1994, less than eight months after the revocation of its license. However, the Commission refused to place the item on the agenda, stating that LDRA's license revocation was in litigation. Additionally, in August 1996, the Commission attempted to fine LDRA over $200,000.00 for failing to conduct races under its license (which of course, was in litigation). This action is unprecedented in the history of Louisiana racing. Two of the other racetracks took several years from the date of the initial grant of the license by the Commission to build their facilities (Louisiana Downs 10 years from the date of its original license; the former Jefferson Downs approximately 5 years). A third association was granted a license in 1994 and has yet to even acquire the property and/or begin construction. Although under state law the license granted to this association is site specific, the

Commission has allowed this association to change its proposed location at least twice. These time frames are considerably longer than the eleven months that LDRA was afforded by the Commission before it attempted to revoke LDRA's license. LDRA has received unequal treatment by the Commission. Far from the "continued commitment to licensing LDRA," the Commission's actions against LDRA from January 1993 through the present have enabled the Fair Grounds to maintain its monopoly at the expense of LDRA's constitutional rights.

In the antitrust and civil RICO lawsuit filed by LDRA (LDRA's Petition, Appendix O), the Fair Grounds admitted in its statement of undisputed facts in support of a motion for summary judgment that, among other things, the Fair Grounds paid Larry Bankston's legal fees to file and prosecute the two suits contesting the referendum and that the Fair Grounds lobbied the Commission to institute certain actions against LDRA, two of which were the revocation of LDRA's license and fining LDRA over $200,000.00.

The facts and due process issues in the instant case closely parallel the issues before this Honorable Court in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499. Accardi was a habeas corpus action in which the petitioner attacked the validity of denial of his application for suspension of deportation on the ground that the application was prejudged through issuance by Attorney General, prior to Board's decision, of a confidential list of individuals, including the petitioner, whom the Attorney General wanted deported which made it impossible for the petitioner to secure fair consideration of his case. The United States District Court refused to allow offer of proof and entered an order denying the writ and the petitioner appealed. The United States Court of Appeal for the Second Circuit, 206 F.2d 897, entered judgment of affirmance and the petitioner obtained certiorari. The United States Supreme Court, Mr. Justice Clark, held that the allegations entitled the

petitioner to a hearing and reversed the decisions of the Court of Appeal and District Court.

The petitioner did not attack the constitutionality of the Immigration Board's rules. His allegations attacked the results obtained by the Board's actions (or inaction) in violation of its rules and his due process rights. Here, LDRA advances an identical argument. In Accardi, the Board of Immigration was appointed by the Attorney General, but the legislature granted the Board the same discretionary authority conferred by statute upon the Attorney General and denied to the Attorney General the right to side step the Board or to dictate its decisions. In the instant case, state law grants the Commission the sole authority to decide issues before it. State law requires that the Commission must act in conformity with the constitution, the racing statutes, the Administrative Procedure Act and the Open Meetings Law. The role of the Louisiana Attorney General, or his representative, is clearly limited by statute to serve as advisor to the Commission. The record is abundantly clear that before the motion to dismiss was filed, the Commission did **not** hold a hearing on the matter of LDRA's October 30, 1998 license application, **nor** did it convene to even discuss the issue of compliance with the consent judgment in this case. The Commission's counsel (an Assistant Attorney General) arbitrarily and capriciously determined that a conditional contract between two parties who considered themselves bound by its terms was unenforceable and that LDRA had not complied with the consent judgment.

In Accardi, this Court stated:

> [5][6] The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. . . . In short, as long as the regulations remain operative, the

> Attorney General denies himself the right to side step the Board and dictate its decision in any manner.
>
> This Court summarizes its review in:
>
> [8] Failure of the Board of Immigration Appeals to exercise its own discretion in determining whether application for suspension of deportation should be granted is a denial of due process.

In the instant case, throughout its long history of litigation, as well as in the Petition filed herein, LDRA cites numerous specific instances supported by the record wherein the Commission failed to follow its statutory mandates, therein violating LDRA's due process rights. In the final action prompting this appeal, there is no question that the Commission failed to act and that its attorney exceeded her authority. The Commission's counsel seeks with great emphasis to exonerate the Commission by articulating the subsequent action by the Louisiana Courts. This Honorable Court in Accardi took note that the District Court refused offers of proof and entered an order denying the writ on allegations of the petitioner without a written opinion. This is identical to the State District Court's actions in the LDRA case. This Court further noted that the Court of Appeal affirmed the ruling of the District Court. Obviously, this Court determined in Accardi that the violation of due process occurred at the administrative level and reversed both the District Court and the Court of Appeal.

The Commission, on page 5 of its opposition brief states that it gave notice to LDRA that its "eligibility to retain its license in the face of its apparent difficulty to bring a racetrack to Livingston Parish would come for hearing on April 29, 1994 in New Orleans before the Commission." The Commission did not attach this alleged certified letter and two separate subpoenas to its brief. In any event, such a notice would in no way comport with due process since the April 29, 1994 hearing was not held in New Orleans, but in Bossier City, approximately 300 miles away from New Orleans. See LDRA's Petition, Appendix M, (p. 1m).

The Commission's November 10, 1998 motion for dismissal was allegedly based on deficiencies in the loan commitment issued to Al Ransome and LDRA. The Commission admits that it did receive the license application timely. This invoked Paragraphs 7 through 10 of the consent judgment (LDRA's Petition, Appendix N, pp. 3n-4n), under which the Commission, not its attorney, was required to take action. The fact that LDRA applied for the license for its own behalf in the name of its wholly owned subsidiary, LDRA, LLC, was a minor technical point which the Commission, *in the required hearing*, had the discretion to accept.

Even if it was determined that paragraph 15 of the consent judgment was appropriate, it was a question of fact that could only be determined by the full Commission. At the very minimum, Louisiana law required that the full commission convene in open meeting after proper notice and vote to go into executive session to discuss litigation. After discussing their attorney's recommendation, the law further requires that the Commission reconvene in an open meeting and cast a recorded vote to authorize its attorney to file the motion to dismiss. The record is clear that the Commission failed to do so.

In reversing the decision of the United States District Court for the District of South Carolina which upheld the administrative order in United States v. Morgan, 193 F.3d 252, the U.S. Court of Appeal, Fourth Circuit, in a ruling issued September 21, 1999 writes at:

> [9] We have recognized that an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination. See, e.g., Delgado-Corea v. INS, 804 F.2d 261 (4th Cir. 1986). This principle is rooted in **United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)**, . . .The **Accardi** doctrine, as it has come to be known, has since been applied in a

> variety of contexts. *(citations omitted)* The fact that a particular regulation or procedure is not mandated by the Constitution or by statute is of no moment for purposes of an analysis under the **Accardi** doctrine. *(citations omitted).*

The Commission argues in its opposition brief that LDRA "has never, and still does not, challenge the factual findings first made by the trial court that the conditional commitment for collateralized mortgage financing was not an "enforceable, binding commitment" per the terms of the Consent Judgment." However, paragraph 16 of the Consent Judgment reserved that jurisdiction to the Commission. (LDRA's Petition, Appendix N, page 6n-7n). LDRA cannot challenge findings of fact that have never been made. The Commission never conducted an investigation, nor did it hold an adjudicatory hearing from which it could factually determine that the financial commitment submitted by LDRA on October 31, 1998 was not an "enforceable, binding commitment." The trial court, despite being required to hold a trial de novo, never made a factual determination that LDRA's financial commitment was not an "enforceable, binding commitment." Likewise, the Louisiana Fourth Circuit Court of Appeal did not hold that the financial commitment was not an "enforceable binding commitment." Rather the Court of Appeal, for other reasons, ruled that the financial commitment did not comply with the Consent Judgment. However, this ruling of the Court of Appeal was made without the benefit of a complete record and without the benefit of any evidence or written reasons from the trial court.

Even the Commission, on page 27 of its opposition brief, admits that particular documents necessary to the appeal were not in the record and that the record before the Fourth Circuit Court of Appeal was incomplete. Proper judicial review was impossible.

CONCLUSION

The right to conduct a legitimate business and to earn a living is a fundamental right. If a person is required to obtain a license from a state regulatory agency in order to conduct that business and to earn a living then that license becomes one of the most valuable pieces of property that a person can own. If that license is arbitrarily and capriciously revoked by the agency in a manner that blatantly disregards all procedures established to guard against such actions then that person's due process rights under the Fourteenth Amendment have been violated. That violation continues when the process of judicial review is marred by the trial court's failure to hear evidence and to provide the appellate courts with a complete record necessary to the appeal.

In Accardi, this Court did not address the merits of the arguments of either party. The Court wrote at p. 268:

> If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations required in such proceedings.

LDRA respectfully urges this Honorable Court to weigh the facts of this case in accordance with the well established Accardi doctrine and grant LDRA's petition for certiorari.

Respectfully submitted:

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